United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,054

ANDREW BURINSKAS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside An Order of the National Labor Relations Board

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JOINT APPENDIX

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1 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-4886

FERRELL-HICKS CHEVROLET, INC.

and

ANDREW BURINSKAS, an Individual

Complaint and Notice of Hearing

It having been charged in Case No. 13-CA-4886 by Andrew Burinskas, an individual, that Ferrell-Hicks Chevrolet, Inc. (hereinafter referred to as Respondent), has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq. (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director for the Thirteenth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I

The charges in Case No. 13-CA-4886 was filed on May 14, 1962, and a copy thereof was served on Respondent by registered mail on or about May 17, 1962.

II

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of the State of Illinois, and at all times material herein, has maintained its principle place

of business at 5727 S. Ashland Avenue, Chicago 29, Illinois.

(b) During the calendar year 1961, the Respondent, in the course and conduct of its business operation, sold new and used cars, trucks and new parts, and serviced new and used cars and trucks at retail, the gross value of which exceeded $500,000.

(c) During the same period of time, Respondent received goods valued in excess of $50,000 transported to its
2 place of business in interstate commerce directly from States of the United States other than the State of Illinois.

III

Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV

Automobile Salesmen's Union of Chicago and Vicinity is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

V

At all times material herein, the following named persons occupied positions set opposite their respective names, and have been and are now agents of the Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act.

Bert Ferrell	President
Jack Hagerty	New car sales manager
Tom Frachalla	Used car sales manager

VI

On or about May 10, 1962, Respondent terminated the employment of Andrew Burinskas.

VII

Respondent engaged in the act described in paragraph VI because said employee joined or assisted the Union or engaged in other concerted activity for the purpose of collective bargaining or other mutual aid or protection.

VIII

By the acts described in paragraphs VI and VII above, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranted in Section 7 of the Act, and thereby did engage in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

IX

By the acts described in paragraphs VI and VII above, the Respondent did discriminate, and is discriminating, in regard to hire, or tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

X

The acts of the Respondent described in paragraphs VI and VII above, occurring in connection with the operations of Respondent's business, described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Sections 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 6th day of August 1962, at 10:00 A.M., C.D.S.T., in Hearing Room "B", 22nd Floor, Midland Building, 176 West Adams Street, Chicago 3, Illinois, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the
4 allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Chicago, Illinois, this 22nd day of June, 1962.

ROSS M. MADDEN
Ross M. Madden, *Regional Director*
National Labor Relations Board
Thirteenth Region
176 West Adams Street
Chicago 3, Illinois

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1 **Intermediate Report**

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519), was heard at Chicago, Illinois, on September 17-19, 1962, pursuant to due notice. The complaint, issued on June 22, 1962 by the General Counsel of the National Labor Relations Board, on a charge dated May 14, 1962, alleged, in substance, that Respondent Ferrell-Hicks

Chevrolet, Inc., had engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the aforementioned Act by discharging Andrew Burinskas on May 10, 1962, because he joined or assisted a labor organization, or engaged in other concerted activity for the purpose of collective bargaining or other mutual aid or protection. Respondent answered said complaint and, though admitting that it discharged Burinskas, denied the commission of any unfair labor practice.

Upon the entire record in the case,[1] and my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdictional findings

Respondent, an Illinois corporation, is engaged in the sale of new and used cars, trucks, and automobile parts, in the city of Chicago, Illinois. During the calendar year 1961, Respondent, in the course and conduct of its business operations, sold new and used cars, trucks and new parts,
and serviced new and used cars and trucks at retail,
2 the gross value of which exceeded $500,000. During
the same period, Respondent received goods valued in excess of $50,000 transported to its place of business in interstate commerce directly from States of the United States other than the State of Illinois. Respondent admits, and I find, that at all times material herein it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

Automobile Salesmen's Union of Chicago and Vicinity is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

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[1] Respondent's unopposed motion, made on or about October 24, 1962, to correct the transcript of testimony is hereby granted, and the transcript is accordingly corrected. Motions on which ruling was reserved at the hearing are disposed of in accordance with the findings and conclusions that follow.

III. The unfair labor practices

Andrew Burinskas, more generally known as Andy Burns and by which latter name he will be referred to hereafter, was employed by Respondent as a salesman from September 1955 to May 10, 1962, when he was discharged. In July 1961, he became a member of Automobile Salesmen's Union of Chicago and Vicinity, hereinafter referred to as the Union, and during the same month became chairman of its organizing committee. As such, he solicited membership in that Union from salesmen employed by a substantial number of automobile dealers in the Chicago area, included those employed by Respondent. The literature that was broadly circulated in that campaign contained his signature as chairman of the organization committee.

Thereafter, Burns filed the Union's petition with the Board seeking an election among the salesmen of five automobile dealers, including Respondent, to determine whether those employees desired collective bargaining representation by the Union. Burns actively participated in the consolidated hearings on those petitions and gave testimony therein, as did Bert Ferrell, president of Respondent. On November 27, 1961, the Board's Regional Director issued his Decision and Direction of Election finding that a question concerning representation existed and ordering the election among Respondent's salesmen requested by the Union. The date of that election was subsequently fixed for December 20, 1961.

On the day following that which the aforementioned Regional Director had limited as the time within which the notice announcing that election was to be posted, Burns called Ferrell's attention to the fact that the notice had not yet been posted. Ferrell replied that he had just received the notices that morning and that he had no objection to having them posted by Burns. Burns went to Ferrell's office, took the notices and proceeded to a glass partition near the telephone switchboard, and posted the

notice. As he was engaged in that task, Ferrell passed by and, looking at Burns, said: "No s— of a b— is going to tell me how to run my business." Burns turned to Ferrell and, raising his hand to his ear, asked Ferrell to repeat what he had said. Ferrell looked at Burns and repeated the remark just attributed to him, word for word. Burns "looked at him kinda funny," and walked away.[2]

On December 15 or December 16, 1961, Ferrell informed Burns that the Christmas party, at which a cash bonus was to be distributed to the salesmen, would be held on Tuesday, December 19. Burns told Ferrell that he could not hold the party "this close to the election" because of a "ruling . . . pertaining to 24 hours before election time when [he could] not throw this party."[3] Ferrell said he would check the matter and Burns left Ferrell's office. Ferrell made a telephone call and later told Burns that he was "right," and that the party would be held on Monday, December 18. When Burns asked why it had to be on that Monday, and not on the preceding Friday or Saturday, Ferrell merely replied that he thought "the men [would] enjoy it on a Monday," and the party was held on that day.

A few days before the election, Respondent, over Ferrell's signature, sent a letter to its salesmen other than Burns, "referring to salesmen and the Company as a marriage and they couldn't afford to have a third party coming in to break up this marriage."

The Union lost the election conducted on December 20 among Respondent's salesmen, but was successful in the vote conducted on that day among the salesmen of two other dealers.

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2 Ferrell admitted he made the remark attributed to him in the text, but testified that it had reference to a telephone caller who called him several minutes earlier and who gave him "quite a chewing out." I do not credit that explanation.

3 See *Peerless Plywood Co.*, 107 NLRB 427.

Isabel LaBan, Respondent's bookkeeper and its observer at the election, testified, credibly, that while "the men were taking turns to cast their vote" and Ferrell was standing about 25-30 feet away, "telling the men to go and cast their ballots and get the election over with," Burns observing Ferrell, said in LaBan's presence: "Get that s— of a b— out of here." When the election was completed, LaBan reported Burns' remark to Alma Klinnicke, Respondent's business manager. The latter immediately informed Jack Haggerty, Respondent's sales manager, of Burns' remark.

On the day following the election, Ferrell told Burns to "forget" the election, that he had instructed "the boys not to tease [him], not to horseplay with him," but only to go back to work. Burns remonstrated that he was "really hurt" by the results of the election because he felt that "it was [Respondent's] money that beat [him]."

Because elections at other dealers were coming up, Burns drafted and signed a bulletin entitled "Keep the Ball Rolling." In addition to arguments for continuing the Union's campaign, the bulletin contained the following pertaining to the election among Respondent's employees:

> The results of the first five elections are in. The results are encouraging. Your Union of Automobile Salesmen now has a nucleus on which to build for the future.
>
> * * *
>
> The election losses point up some interesting facts: Ferrell-Hicks—the regular professional auto salesmen were for the Union, the newly hired, come lately "salesmen" were against the Union. The election was lost 12 to 8. A switch of three votes would have meant a union victory. Ferrell-Hicks at the time of filing for the election only employed 12 salesmen. By election time 20 salesmen were on the floor.

Burns mailed the bulletin to all members of the Union and personally distributed copies thereof to Respondent's salesmen. Copies of this bulletin must have reached Haggerty within a few days after the election for he then called Burns into his office and told him that he thought Burns was "through with the Union." Burns replied that Haggerty ought to "wait and see the results of the election to be held" later that month and then he would know whether Burns was "through or not." Haggerty admitted he made this inquiry so he would "know, honestly, whether he was or wasn't" through with the Union.

In January 1962, the Union drafted wage proposals for submission to the Ford dealers where the Union had won the election. The proposals were mailed to the union membership and copies were circulated among Respondent's salesmen by Burns. Haggerty admitted he saw these proposals and that he told Burns that "it was economically impossible for a dealer in the Chicago area to pay that amount of money to their salesmen and stay in business."

During a day in the week or 10 days before Burns was discharged on May 10, Haggerty asked him "what's going on" with the Union. Burns replied that the negotiations with the other dealers were being unduly delayed by evasive tactics and that the "*government* [*was*] *going to start looking into this.*"

Thomas Franchalla, employed by Respondent as its used car manager since March 7, 1962, testified that during the evening of Monday, May 7, 1962, while 4 or 5 salesmen were on duty, he observed a young couple drive up and enter the showroom. He further testified that because the salesmen were "completely ignoring the people," he greeted and gave them the price of a new car which "didn't quite suit them." He then suggested purchase of a used car, took them over to the used car lot in a "pouring" rain and, "within 30 minutes from the time they entered

the door, [they] were changing the plates to make delivery" of the used car. Franchalla, as used car manager, got no commission for making that sale. If the sale had been made by a salesman, the latter would have been entitled to a commission thereon.

On the following day, May 8, some of the salesmen, "grumbling in dissatisfaction," complained to Burns about Franchalla's conduct of the evening before in "grabbing a customer [from] an up," and selling him a car.[4] At a regularly scheduled meeting of salesmen during the morning of Wednesday, May 9, Haggerty, in order to improve the sales technique of the salesmen, brought up the incident of the previous Monday when, in his words, Franchalla "had taken an up on the showroom floor." Herbert Harrison, a salesman, with other salesmen "all pitching in, . . . explicitly pointed out that it wasn't right for [Franchalla] to have taken that up." Haggerty told the men that Franchalla "had not taken this up until the customer had walked past four or five salesmen that were on the floor, spent some time waiting and looking at a car, and then went over and greeted him and talked to him." At the conclusion of that discussion Burns said: "Ah s—t, he's just trying to make a point." Though Haggerty testified that, in his opinion, Burns' remark "ruined the whole effect" of his talk, the only factor to which he pointed for drawing that conclusion was that, following Burns' remark, "all the men . . . broke out laughing."[5]

Later during the same day, Burns came to Haggerty's office and told him that "what Franchalla did, . . . was a stinko," and added: Jack, Tom Franchalla is out to get your job."

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[4] An "up" is the term applied by salesmen to designate which salesman it is who is entitled to the next prospective customer who appears in the showroom.

[5] Alvin Herman, a witness in behalf of Respondent, testified that Haggerty joined in the laughter.

Wednesday, May 9, the day of the aforementioned meeting being his day off, Franchalla did not go to Respondent's premises during that entire day. He testified however, that *about 9 p.m.* of that day, on his way home from a visit to his mother-in-law, he went to Respondent's place of business to check and "see if everything was in order in [his] department." He further testified that he met Haggerty there as the latter was driving a car out of the building, asked him how things had gone that day, and that Haggerty told him that the discussion at the meeting concerning Franchalla's sale of the previous Monday evening "got kicked around, and [that] Andy Burns told him to look out" for Franchalla.[6] He further testified that when he asked for more information, Haggerty told him that he had some people waiting for him and asked Franchalla to stop at his home later that evening. Franchalla reached Haggerty's home about 10 p.m. and Haggerty arrived an hour later.

At that time, Haggerty testified, he told Franchalla about what happened at the meeting that morning, and that Burns had warned him that Franchalla was "out to get [his] job." Franchalla testified he then *repeated what he "had already reported"* to Haggerty, that Burns had told him that Haggerty "smile[s] with [his] teeth, but [one] could tell [he] wasn't sincere by looking into [his] eyes," and that Haggerty was trying to "start the Haggerty dynasty at Ferrell-Hicks."[7] Haggerty further testified that he then told Franchalla that Burns had also called Ferrell "s— of a b—," and that both men decided to discharge Burns on the following morning.

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[6] Haggerty testified that he told Franchalla that he "had a little problem [that] morning and also had another problem in [his] office with Andy Burns."

[7] Burns testified he made such a remark, in substance, to Franchalla a *day or two after* the latter was employed by Respondent as used car manager on *March 7, 1962*, in response to Franchalla's inquiry as to what Burns thought of Haggerty. Franchalla testified he reported Burns' remark to Haggerty "*within 30 minutes*" thereafter.

Burns was, however, not discharged until about 5 p.m. of the following day when he was called into a private office where he found Franchalla and Haggerty. Franchalla, scratching his head, told Burns he did not know "how to begin" but then stated that he understood that Burns had "made a statement about [him] to Jack Haggerty." Burns admitted that he had. Franchalla then asked Burns whether he remembered the occasion in March 1962, described above, when he "made a statement to [him] about Jack Haggerty." Burns replied that he did, and then asked: "So what? Does this mean I'm fired?" Haggerty replied that it did.

Burns asked whether "there was anything wrong with [his] work as far as sales, honesty, . . . anything wrong with [his] job as a salesman?" Franchalla replied there was not, and that while he thought that Burns was a "wonderful salesman, that wasn't it." Burns then accused Franchalla of also having "made a lot of statements" and one in particular which, to save Franchalla embarrassment, he wouldn't mention in front of Haggerty. The latter thereupon left the office following which Burns asked Franchalla whether he remembered calling Ferrell the revolting sexual name reported in the transcript of testimony. Franchalla made no denial or reply, and walked out of the office.

Burns thereafter filed a claim for compensation with the Division of Unemployment Compensation for the State of Illinois. On July 31, 1962, that body made a determination that "it has not been shown that the claimant committed any act to cause dissension between employees. He was not discharged for misconduct connected with his work."[8]

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[8] That determination, though not controlling on me, is nevertheless relevant, and may be considered by me. *Aerovox Corporation*, 104 NLRB 246; *Cadillac Marine & Boat Co.*, 107 NLRB 108, fn. 1; *Mitchell Plastics, Inc.*, 117 NLRB 597, fn. 1.

There is only one issue involved in this proceeding—was Burns discharged "because of his union activities and in order to defeat unionization of [Respondent's] automobile salesmen" as urged by the General Counsel, or was he discharged for the reasons stated by Respondent's counsel in response to my inquiry during the hearing—that Burns made "remarks that were disrespectful towards management" and which the latter "felt had the effect of dividing management."

The question so posed is not susceptible of easy determination as it involves an inquiry into the state of mind of Haggerty and Franchalla. That inquiry requires that all the facts and circumstances disclosed by the record be carefully considered and appraised with due regard for the well established principle that the harshness of Respondent's action, by itself, does not establish unlawful discrimination.

That Respondent had knowledge of the extremely active role played by Burns in behalf of the Union is not, indeed could not be, challenged on the record made herein. Neither is it denied that Burns was one of Respondent's best salesmen. Thus, at the Christmas party at which there was a distribution of a jackpot bonus among all of Respondent's 15-20 salesmen, the amount of which was based on each man's sales, Burns' bonus check was exceeded by only one other salesman. Also based on his performance, he had for 3-4 years preceding his discharge, achieved membership in Chevrolet's Hall of Honor Club, and had been awarded a cabinet maker's electric saw, a moving picture camera, binoculars, silver bookends, and numerous other prizes.

In light of that record and the fact that Respondent was opposed to the organization of its salesmen, the reasons assigned for terminating Burns' services must be carefully scrutinized. Here again, however, I am duly mindful that

an employer may, by lawful means, express his opposition to the Union, discharge an employee for a good or a bad reason, or no reason at all, except only that he may not do so for a reason or by means proscribed by the Act. Nevertheless, human experience cautions that employers do not lightly dispense with the services of a top notch salesman and who is therefore, an outstanding money maker for his employer. With all of the foregoing as guideposts, what were the offenses for which Burns was discharged?

The first "disrespectful" remark on which Respondent relies is the indecent remark about Ferrell made by Burns to LaBan on the morning of the election on December 20, 1961.[9] The record does not disclose that Ferrell was ever advised of Burns' disrespectful inquiry to LaBan and, though it was reported to Haggerty within a few hours after it was made, the latter apparently did not deem it of sufficient gravity to mention it to, criticize, or admonish, Burns therefore until he was fired 5 months later.

Turning now to the alleged "dissension" caused by Burns—setting Franchalla and Haggerty off, one against the other—the first evidence of this alleged campaign to create dissension, Respondent contends, concerns Burns' statement to Franchalla about Haggerty's lack of sincerity a day or two after Franchalla was hired as used car manager on *March 7, 1962*. Viewing this accusation in a light most favorable to Respondent, I cannot attribute to it the implication now drawn therefrom by Respondent.

7 It was an evaluation of Haggerty, solicited by Franchalla, an opinion which Burns apparently entertained. And, though Franchalla testified that he reported the remark to Haggerty within an hour or two after it was made, Haggerty was not sufficiently disturbed thereby to discuss or even mention it to Burns until he discharged him 2 months later.

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[9] Without condoning that remark, it should be noted, however, a similar remark was twice directly addressed to Burns by Ferrell about a week earlier.

There remain for consideration the last incidents upon which Respondent relies—Burns' remark at the sales meeting of May 9, and his statement to Haggerty later during the same day that Franchalla was "out to get [his] job." With respect to Haggerty's reaction to Burns' remark at the sales meeting and the part it allegedly played in calling the nocturnal session with Franchalla, I am not persuaded that Haggerty considered it so provocative as to require action by him. Indeed, the laughter which it apparently induced, and in which Haggerty joined, helped to put an end to a discussion of whether Franchalla had unduly deprived a salesman of the commission on the car Franchalla sold on May 7. And, though Haggerty testified to a conversation he had with Burns a few hours after the conclusion of the sales meeting on May 9, the record fails to disclose that he then criticized Burns for his remark during the meeting, or otherwise indicated any displeasure concerning Burns' conduct thereat.

On the entire record, I do not regard as worthy of belief the announced conclusion by Haggerty and Franchalla that Burns' remark to Franchalla concerning Haggerty's lack of sincerity, and his remark to Haggerty that Franchalla was out to get his job, spaced more than 2 months apart, belong in the same category, or that they led to their conclusion that Burns was playing one against the other, and should be fired for that reason. Instead, consideration of the entire record, coupled with my observation of the demeanor of the witnesses involved as they testified, have brought me to the conclusion that they met clandestinely near midnight to concoct a defense having the appearance of legality, and to cover the true reason for Burns' discharge—his union activity.

I am convinced, and find, that Burns' remark at the sales meeting and his later statement to Haggerty did not meet with such resentment by Haggerty as to induce the near midnight meeting for an objective and honest con-

sideration of those incidents. Indeed, when Burns made the remark about Franchalla, Haggerty figuratively shrugged it off as mere gossip by telling Burns he did not believe it, and without even deigning to inquire of him the basis for his accusation against Franchalla.

Instead, I am convinced that during the afternoon Haggerty realized that Burns' accusation against Franchalla presented him with an opportunity to utilize it as plausible, without disclosing the real, reason for getting rid of the chairman of the Union's organizing committee thereby crippling, if not completely destroying, further union activity among Respondent's salesmen. I am certain that if any other salesman had indulged in the conduct which Respondent now advances as the reasons for which Burns was discharged, that no such unusual meeting would have been held, nor would he have been similarly treated.

Considering Haggerty's reaction when Burns' accusation against Franchalla was made, I cannot believe that, absent an ulterior and discriminatory motive, he later concluded that the matter was so urgent that it had to be considered in the late hours approaching midnight and could not be postponed to the regular business hours of the following day. Instead, I find that Haggerty brought that nocturnal meeting about so that he could concoct a scheme or rationale for discharging Burns which would have an air of plausibility—reasons which prior to that time seemed not to unduly disturb him.

The timing of Burns' discharge lends credence to the conclusion just announced. It will be remembered that it was only the day before that Harrison and other salesmen at the sales meeting expressed resentment concerning Franchalla's sale, a resentment which Burns again voiced to Haggerty during the same afternoon.

Significant also is the fact it was only about a week before he was discharged, that Burns, in response to an

inquiry by Haggerty as to "what's going on with the Union," told him that "the government [was] going to start looking" into the evasive practices of other dealers in delaying collective bargaining with the Union. This warning, together with what has heretofore been found with respect to Burns' union activity, must have made it clear to Haggerty that Burns was far from "through" with the Union, as Haggerty had earlier expressed the hope, and that he was, instead, still extremely active therein. The foregoing, coupled with the fact that the Union could, during the following December, again petition the Board for an election among Respondent's salesmen, brought Haggerty to the realization that the best and quickest way to avoid organization of those employees was to rid Respondent of the Union's most active proponent. By discharging him for that reason, Respondent violated Section 8(a)(3) and 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It having been found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It is also recommended that Respondent offer Andrew Burinskas immediate and full reinstatement to his former or substantially equivalent position, without prejudice to

seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he would have earned as wages from the date of the discrimination against him to the date of offer of reinstatement, less interim earnings, and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.

It is further recommended, in view of the nature of the unfair labor practices Respondent has engaged in, that it cease and desist from infringing in any manner upon the rights guaranteed employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Respondent, Ferrell-Hicks Chevrolet, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of the Act and admits to membership employees of Respondent.

3. By discriminating in regard to the hire or tenure of employment of Andrew Burinskas, thereby discouraging membership in the above Union, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

9 4. By engaging in the conduct set forth above, Respondent has engaged, and is engaging, in unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Ferrell-Hicks Chevrolet, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Automobile Salesmen's Union of Chicago and Vicinity, or in any other labor organization, by discharging, refusing to hire or to reinstate employees, or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer Andrew Burinskas immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of this report entitled "The remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to an analysis of the amount of back-pay due under the terms of this Recommended Order.

(c) Post at its offices in Chicago, Illinois, copies of the notice attached hereto and marked Appendix.[10] Copies of said notice to be furnished by the Regional Director for the Thirteenth Region, shall after being duly signed by Respondent, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for the Thirteenth Region, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order what steps Respondent has taken to comply herewith.[11]

Dated at Washington, D. C., November 23, 1962.

DAVID LONDON
David London
Trial Examiner

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10 In the event of Board adoption of this Recommended Order, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event of enforcement of the Board's Order by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

11 In the event of Board adoption of this Recommended Order, this provision will be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

11 NOTICE TO ALL EMPLOYEES

PURSUANT TO THE
RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in AUTOMOBILE SALESMEN'S UNION OF CHICAGO AND VICINITY, or in any other labor organization of our employees, by discriminating in regard to hire or tenure of employment or any term of employment.

WE WILL offer to Andy Burns immediate and full reinstatement to his former position without prejudice to any seniority or other rights previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities.

FERRELL-HICKS CHEVROLET, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Midland Building, 176 West Adams Street, Chicago 3, Illinois (Tel. No. Central 6-9660), if they have any question concerning this notice or compliance with its provisions.

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1 **Decision and Order**

On November 23, 1962, Trial Examiner David London issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief. The General Counsel filed a brief in support of the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in certain of the Respondent's exceptions.

The prime issue in this case is whether the Charging Party, known as Andy Burns, was discharged for his union activities or for what the Respondent regarded as good cause. The Trial Examiner credited Burns' testimony in many respects and discredited Respondent's witnesses who testified otherwise. Although we accept his resolutions of credibility based on demeanor, we are not required thereby also to adopt his conclusion that Burns was dis-

charged because of Respondent's opposition to his activities on behalf of the Union.

Burns was one of Respondent's better salesmen. In his free time he was also in charge of organizing activities for Automobile Salesmen's Union of Chicago and Vicinity. He had never concealed his union activities and had actively promoted an organizational drive which led in December 1961 to the holding of elections among the employees of five automobile dealerships, including this Respondent. On December 20, 1961, the Union lost the election conducted among the Respondent's salesmen but was successful at two other dealerships. The Union did not file objections to the conduct of the election in the representation proceeding, nor has the Trial Examiner found any independent violation of Section 8(a)(1), either during the election campaign or in the period between the election and Burns' discharge on May 9, 1962, more than 4 months later.

It is the theory of the General Counsel that Respondent's union animus was revealed by the following incidents: *before the election* (1) by a remark of Ferrell, Respondent's president, to Burns that "no s.o.b. is going to tell me how to run my business"; (2) by holding a Christmas party 2 days before the election at which bonuses were distributed to salesmen: and (3) by sending a letter to its salesmen during the preelection campaign which referred to the salesmen and the Company as a marriage which should not be broken up by a third party. *After the election* (1) Haggerty, the New Car Sales Manager, prompted by a circular Burns had distributed on the results of the election, asked Burns if he was through with the Union; (2) later, on seeing a copy of the wage proposals which the Union had submitted to the dealers where it had been certified, Haggerty told Burns that it was economically impossible for dealers to pay those amounts and stay in business; and (3) a week or so before Burns was discharged, Haggerty asked him what was

going on with the Union, to which Burns replied that negotiations with the dealers were being delayed by their evasive tactics and that the Government was going to have to look into it.

The Trial Examiner agreed with the General Counsel that the incidents set out above established that Respondent was opposed to organization of its salesmen. He also accepted the General Counsel's contention that the conversation between Burns and Haggerty shortly before the discharge made it clear to Haggerty that Burns was far from through with the Union and that Respondent might again be faced with a petition for an election the following December. It was in this context that the Trial Examiner evaluated and rejected Respondent's
3 defense that it had discharged Burns because he had made disrespectful remarks about management officials and because he was attempting to create dissention between Haggerty and Frachalla, the New and Used Car Sales Managers, respectively.

Frachalla had been discharged the year before from the position he then held as New Car Sales Manager, and had reason to believe that Burns had played a role in his termination.[1] Haggerty succeeded Frachalla as New Car Sales Manager, and in March 1962 was helpful to Frachalla in getting him rehired as Used Car Sales Manager. Shortly after Frachalla returned to Respondent's employ, Burns told him in effect that Haggerty could not be trusted and was insincere. Two months later, on the day before he was discharged, Burns then told Haggerty that Frachalla was out to get his job. So far as the record shows, the decision to discharge Burns was made and carried out by Haggerty and Frachalla alone.

Each was aware that Burns had made uncomplimentary remarks about him to the other, and Frachalla, for one,

[1] The Trial Examiner did not refer to the uncontroverted evidence in the record on this point.

had reason to fear that Burns' tactics might again cost him his job. Nor do we find it altogether unreasonable to believe that Haggerty and Frachalla may also have been influenced in deciding to discharge Burns by other remarks he had made about them and about Ferrell which they considered to be disrespectful.

Whether the reasons which Respondent contends prompted it to discharge Burns are pretexts depends basically on a judgment that Respondent resented or feared Burns' activities on behalf of the Union. We are not convinced that Respondent was strongly opposed to the Union. It undoubtedly preferred that its salesmen remain unorganized, but it had already been successful in one election while a second could not be held for at least 7 months. At no time before or after the election did it engage in conduct violative of Section 8(a)(1). In view of its restrained attitude in the past toward Burns and the Union, we think it is mere speculation to infer from Burns' remark to Haggerty about other dealers being evasive that Haggerty would then decide that Burns intended to continue working to organize Respondent's salesmen, and should, therefore, be discharged as soon as possible. Consequently we conclude, contrary to the Trial Examiner, that the General Counsel has failed to establish by a preponderance of the evidence that the discharge of Andy Burns violated Section 8(a)(3) and (1) of the Act.

In view of the foregoing, we shall dismiss the complaint.

Order

IT IS HEREBY ORDERED that the complaint filed herein be, and it hereby is, dismissed.

Dated, Washington, D. C., April 22, 1963.

PHILIP RAY RODGERS, *Member*
BOYD LEEDOM, *Member*
National Labor Relations Board

(Seal)

FRANK W. MCCULLOCH, Chairman, dissenting

I would adopt the Trial Examiner's findings, conclusions, and recommendations in their entirety.

Dated, Washington, D. C., April 22, 1963.

FRANK W. MCCULLOCH, *Chairman*
National Labor Relations Board

Prehearing Conference Stipulation

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, hereby stipulate as follows with respect to the issues, the procedure, and the dates for the filing of the briefs and joint appendix herein.

I.

THE ISSUE

Whether the National Labor Relations Board's dismissal of the General Counsel's complaint alleging that the employer, Ferrell-Hicks Chevrolet, Inc., violated the Act in discharging the petitioner, Andrew Burinskas, was proper.

II.

THE JOINT APPENDIX

A. The portions of the record to be printed shall be embodied in a Joint Appendix. The printed Joint Appendix shall be filed in this Court and served, after filing and service of the briefs, on or before December 30, 1963. Petitioner shall serve its designation of the contents of the Joint Appendix on or before November 1, 1963. Respondent shall serve its designation of the contents of the Joint Appendix on or before November 11, 1963. Any further designation by petitioner shall be served on or before December 3, 1963.

B. Each party shall bear the expense of printing in the Joint Appendix the portions of the record designated by it. Petitioner shall include in its designation and bear the expense of printing the Board's Decision and Order, the Intermediate Report of the Trial Examiner, this stipulation, and this Court's order thereon. The printing of the record shall be the responsibility of the petitioner, provided that respondent furnishes it with a complete copy of the record from which to print.

C. It is further agreed that any party and the Court, in the briefs and at and following the hearing in the case, may refer to any portion of the original transcript of the record herein which has not been printed, to the same extent and effect as if such portions of the transcript had been printed or otherwise reproduced, it being understood that any portions of the record thus referred to will be printed in a supplemental Joint Appendix if the Court directs the same to be printed.

III.

Filing the Briefs

Petitioner will file and serve its brief on or before November 1, 1963. Respondent will file and serve its brief on or before November 26, 1963.

Mozart Ratner
Counsel for Petitioner

Dated at Washington, D. C.,
this 26th day of September, 1963.

Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.,
this 24th day of September, 1963.

Filed October 4, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,054

ANDREW BURINSKAS

v.

NATIONAL LABOR RELATIONS BOARD

Before: BURGER, *Circuit Judge*, in Chambers.

Order

Counsel for the parties in the above-entitled case having submitted their prehearing stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix of the parties herein.

Dated: October 4, 1963.

6 **Andrew V. Burinskas**

was called as a witness by and on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined and testified as follows:

• • • • • • • • • • •

Direct Examination

Q. (By Mr. McCabe) Are you also known by another name Mr. Burinskas? A. Also known as Andy Burns for business conveniences. A-n-d-y- B-u-r-n-s.

7 Q. What is you occupation? A. Automobile salesman.

Q. Were you formerly employed at Ferrell-Hicks Chevrolet? A. Yes, I was.

Q. When were you employed there? A. From September, 1955 through May 10, 1962.

Q. And what was your job at Ferrell-Hicks? A. Automobile salesman, new and used cars, trucks and so forth.

• • • • • • • • • • •

14 Q. Prior to the election, did you have any conversation with Mr.—. Strike that. Who is Burt Ferrell? Do you know him? A. Mr. Burt Ferrell is the principal owner of Ferrell-Hicks Chevrolet, Inc., president.

Q. Is he active in the operation of the business?

15 A. Yes, sir. Very active.

Q. Prior to the election, did you have any conversation with him with respect to the Union? A. Yes, sir. From time to time we had conversation with Mr. Ferrell.

Q. Do you recall any comments he may have made within a day or two of the election? A. Yes, sir. Mr. Ferrell called me in his office, said, "Sit down." We started talking and the main thing that was discussed—he said to me—Mr. Ferrell told me—he says, "Andy," he says, "why did you get started in this Union deal? If you would have come to me and talked to me about it, I would have helped you."

Q. Now, when did this conversation take place? A. Just before the election, I'd say. On or about a week or ten days before the election.

Q. Was anyone else present in this—when you had this conversation? A. In his office? No, sir. There was just Mr. Ferrell and I.

Q. What, if anything else, was said? Did you say anything? A. This talk lasted about fifteen minutes. I don't recall exactly what else was said.

Q. Did you say anything? Did you answer that

16 question? A. Oh, yes. That question was answered by me to this extent: I said, "Mr. Ferrell, if I would have come to you and asked you or told you the boys wanted a union, you would have fired me and you know you would have" and he says—. Beg pardon?

Trial Examiner: What did he say?

The Witness: Then, he replied—he says, "I would never fire you." He says, "You're too good a productive man. We'd never fire you." I said, "Mr. Ferrell, as far as productive men go," I says, "I don't believe you know what each man sells or how many cars he sells." That's about all that I remember.

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17 Q. Did you have a Christmas bonus in 1961? A. Yes, sir. We did.

Q. When was this bonus announced first? A. It was announced April—. I'll take it back. It was an-
18 nounced about May, 1961.

Q. Who made the announcement? A. Mr. Ferrell let it be known on the floor that the boys did a good job and he was going to give them a bonus retroactive through April, 1961 until Christmastime.

Q. What was the terms of this bonus or what did he say about a bonus at that time? A. Well, he said, "For every house deal that came in and was typed up and invoiced as such, he would take and throw into a pool of $10 for house deal." That's a retail deal, not wholesale deals, and this would be split up at Christmastime for the salesmen as a bonus.

Q. That's all he said at that time? A. $10 per car.

• • • • • • • • • •

20 Q. Now, did you ever hear of any subsequent announcement about the bonus by Mr. Ferrell? A.
21 What do you mean subsequent.

Q. He made the initial announcement in May. Did he make any announcement about it at any later time? A. Oh, yes. As things progressed, he come out just a little before election time, about a month. That would be about November, about the last week of October or first of November. He came out. He says, "Well, fellows," He says—. I'll take that back. It was the latter part of November. He came up to the boys on the showroom floor and he says, "Well, boys," he says "got a pretty good month last month. New-car-showing month. I think I'll double the

amount and make it $20 a car for every house deal so you boys will have more money to split up for your Christmas bonus."

Q. When did you say he made this announcement? A. In November, 1961.

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23 Q. (By Mr. McCabe) What time in November did you say this announcement was made? A. The last week of November or the first week of December, 1961.

Q. The last week in November or the first week in December? A. Yes, sir. It was just before election time.

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30 Q. (By Mr. McCabe) Did you have any conversation with Mr. Haggerty with regard to the Union prior to the date of the election? A. Yes, sir.

Q. When did you have this? A. Well, we've had conversations off and on many times relating to Union. We were discussing pros and cons. I was for the Union. They had asked me a lot of questions. What did the Union do for us? He says, "Andy here is an individual, a good salesman, sure. You don't need a union. You could go anywhere and get a job. A good salesman doesn't need a union." Things pertaining to that I shouldn't participate. I should drop it as far as the Union was concerned.

31 Q. What, if anything, did you say? A. I says, "Jack," I says, "I realize that I possibly do not need a union, Jack, but there's a reason why I went ahead with this, and the big reason was I got tired of hearing other salesmen complaining about conditions at Ferrell-Hicks Chevrolet," and later on, as I went out in the street soliciting membership in the Union, I heard more gripes, more complaints. "It isn't I that needs the Union, I realize that, Jack, but I'm really concerned with all salesmen now."

Q. Now, when did you say this conversation took place? Can you fix the time? A. This particular conversation took place on or about the first week of December.

Q. Where? A. In Mr. Haggerty's office.

Q. You testified that you had different conversations from time to time with Haggerty. Where did these occur? A. Mostly in Mr. Haggerty's office.

Q. Would anyone else be present? A. No, sir. He usually calls me and says, "How's the Union going? Come on sit down." Or if I had been working a deal trying to sell a car and I had written a customer up
32 and was almost a deal or possibly may be a deal, I'd have to have my customer's used car appraised, so there'd be a little time consumed in which the used car manager or car appraiser would go out and check the customer's used car. So, Jack and I would sit down and discuss Union many times.

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37 Q. (By Mr. McCabe) And what elections did you have to be held at that time yet? A. We had another six elections to be held from six different dealerships.

Q. Approximately when were these elections to be held? A. There was five more, a group of five more to be held on the 28th of December, 1961.

38 Q. What were these five? A. Fencl-Bogan Chevrolet, Inc.

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Mr. McCabe: According to the information I have, the Union did win at Superior Motors, at Caley Brothers, which were held on the 20th, and also won at Fencl-Bogan and at Oak Park, which was held approximately the 28th. I'm not sure that's the date.

39 Mr. Lennon: How about a stipulation that the second set that they won at Oak Park and Fencl-Bogan the Union won the election?

Mr. McCabe: That's agreeable.

Trial Examiner: All right.

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Mr. McCabe: Very good. Then, it's stipulated that the Union did win at Superior Motors, Caley Brothers, Fencl-Bogan, and Oak Park Motors.

Mr. Grabemann: So stipulated; however, I think, if you

are interested and to clarify the record, the Union won elections at Superior and at Caley on December 20th, they won the elections at Fencl-Bogan and at Oak Park Motors on December 28th.

Mr. McCabe: Very good.

Trial Examiner: The stipulation is amended accordingly.

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Q. Now, when did this conversation take place approximately? A. Approximately a few days after these wage proposals were passed out to the men and mailed to the men.

Q. And did you say where it took place? In Mr. Haggerty's office.

Q. Was anyone else present? A. No, sir.

Trial Examiner: Who started that conversation?

The Witness: Mr. Haggerty would always call me in his office and sit me down and talk to me and would always discuss Union, many times.

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Q. (By Mr. McCabe) You testified that you had conversations at least more than once with Mr. Haggerty. Did you have it often? A. Yes, quite often.

Q. Would you say once a week or more often than once a week? A. It would run in stages, which period would last maybe three or four days. Wouldn't have a conversation. All of a sudden it would run one day the next day. It would all depend on the business, what time of the day it was which would initiate this conversation.

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Q. (By Mr. McCabe) You testified that this particular conversation was near the end of January or thereabouts, I believe. Now, did you have conversations after that with Mr. Haggerty?

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Q. (My Mr. McCabe) And after this conversation, did you have other conversations with Mr. Haggerty? A. Yes, sir.

Q. And you testified that your last date of employment was May 10th? A. Yes, sir.

Q. Did you continue to have these conversations from time to time until you were discharged? I'm sorry. Until the last date of your employment? A. Yes, sir.

49 Quite frequently. In fact, just before my last day of employment, in fact the night before I was ready to go home and Mr. Haggerty says, "Come on in my office and sit down" and this was a period of two or three days in a row in which he did this. I just waived my hand. I said, "Jack, let's forget it. I'm going home." In fact, I don't indulge—. This is the day before I got discharged. As I was going home, he started another one with me.

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74 Q. (By Mr. Lennon) Now, you have testified as to several conversations that you have had with Mr. Haggerty. Have you told us all that you can recall of these conversations? A. No, sir. There was one more that took place by a drinking fountain which was adjoining Mr. Haggerty's office.

Trial Examiner: Fix the time as close as you can, the date.

The Witness: The early part of February, first week—first week of February.

Trial Examiner: Sixty-two?

The Witness: Yes, sir. Sixty-two.

Q. (By Mr. Lennon) Let me ask you something. Did this conversation occur after you had handed out the wage proposals to the employees at Ferrell-Hicks? A. Yes, sir.

75 Q. Will you tell us more of this conversation? You say it occurred around the drinking fountain? A. I went over to the fountain to get a drink of water and this fountain is situated right in the corner by the entrance to Mr. Haggerty's office.

Q. Tell us about what time of day it was, if you recall? A. It was in the morning about 10, 10:30.

Q. Tell us what you said and what he said, if anything? A. It was more or less the same question that was put to

me once before, and he says, "Andy, I thought you were through" or "are you through with the Union" and I replied, "Jack, how could I be through with the union after all these salesmen from places in which we won elections, lost elections, and places where we didn't even file yet for an election to be held are all calling my home and asking me to keep it up, not to quit, don't get disgusted, and stay with it." And that's about all that comes back in my mind.

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76 Q. (By Mr. Lennon) Is that all you can recall of that conversation? A. Yes, sir.

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90 Cross-Examination

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131 Q. (By Mr. Grabemann) When was that election held? A. At Ferrell-Hicks Chevrolet, the election was held December 20th.

Q. And during what hours was the election held on that day? A. It was in the morning. It was the first—. It was 9 to 10, 9:30—9:30, somewhere around 9 o'clock.

Q. Around nine o'clock, and were you present at that time? A. Yes, sir. I acted as an observer for the Union.

Q. Did you see Mr. Ferrell there at that time? A. Yes, sir.

Q. He was present at that time, is that right? A. Yes, sir.

Q. And did you see him before the election started? A. Before the actual balloting took place?

Q. Yes. A. Yes, sir.

Q. And did you see him during the election at

132 any time? A. Yes, sir. He was in the showroom.

Q. And he was away from where you were sitting, is that right? A. No, sir. He was standing right there and were making up the box in which the—the cardboard box which the Labor Board uses for casting your ballots.

Q. That was before the election, is that right? A. Before the election. Yes, sir.

Q. And I asked you did you see Mr. Ferrell during the election after the election started? A. Well, I was an observer for the Union, watching the men cast their ballots, and Mr. Ferrell was off to the side.

Q. And then did you see Mr. Ferrell off to the side during the election, is that right? A. Yes, sir.

Q. Now, Mr. Burns, did you say anything about Mr. Ferrell at that time? A. No, sir.

Q. Didn't you make the remark, Mr. Burns, about Mr. Ferrell: "What's that son-of-bitch doing here"? Didn't you say that? A. I beg your pardon. I never called him that.

Q. You didn't make that statement then, is that right? A. No, sir.

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152 Q. (By Mr. Grabemann) Now, when was it, if you know, Mr. Burns, when Mr. Frachalla was employed by Southwest Chevrolet? A. He was discharged the spring of the year.

Q. Spring of what year? A. 1960. Mr. Haggerty came to work for us. Mr. Thomas Frachalla was supposed to go on vacation: and during the course of his vacation, I guess Mr. Ferrell decided he didn't need him anymore, never was told openly that he was fired, just that Jack was going to assume control. That was April, 1960.

153 Q. That was in April, 1960, then, when Mr. Frachalla was fired, is that right? A. '61—'60—'61

Q. Which is it, Mr. Burns? A. '61.

Q. And do I understand that Mr. Franchalla was fired while he was on vacation or after he had returned from vacation? A. While he was on his vacation. We never heard that he was fired. All we know that he never came back.

Q. I see. And how long had Mr. Frachalla been gone before Mr. Haggerty took his place? A. Well, they were both there at one time working together just for a short while.

Q. In April of 1961 Mr. Frachalla went on vacation, is that right? A. Yes, sir.

Q. And did Mr. Haggerty then become—take the place that Mr. Frachalla had? A. Yes, sir.

Q. And how long had Mr. Frachalla been gone before Mr. Haggerty took Mr. Frachalla's place? A. Well, while Tom was on vacation, walked into Mr. Haggerty's office which Tom had occupied previously, and I seen Mr. Haggerty open the drawers and throwing stuff that belonged to Mr. Frachalla, taking them out of the desk and setting them aside and inserting his own material as far as files and all that and nothing officially was said that he was fired outside of one time when Mr. Ferrell came up to me and asked me, he says, "What do you think of Jack?" This was during the time of his vacation. I says, "I'll work for Jack. I think he's a fine man," and later on while Tom was gone—this is about a month later, maybe later than that—Mr. Ferrell came by me and just volunteered a statement. He says, "Andy, I fired Tom for you."

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Q. And Mr. Ferrell told you that, is that right? Just walking passed me, yes.

Q. And he told you that he fired Tom Frachalla for you or to suit you, is that right? A. Well, there was no discussion on the matter. All he did was go by me and he says in sort of a—not a serious mood, sort of a laughing voice, he says, "I fired Tom for you, Andy."

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183 **Thomas Ralph Frachalla**

was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined and testified as follows:

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184 Direct Examination

Q. (By Mr. Grabemann) Where do you live, Mr. Frachalla? A. 2301 West 72nd Street, Chicago, Illinois.

Q. What is your business, please? A. Automobile business.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet, Inc.

Q. Where are they located? A. 5727 South Ashland Avenue.

Q. Is that in Chicago? A. It's in Chicago, Illinois.

Q. In what capacity are you associated with the Respondent? A. Used car sales manager.

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185 Q. And thereafter, Mr. Frachalla, were you again promoted? A. Yes, sir.

Q. When? A. July, 1960.

Q. And to what position were you promoted at that time? A. New car sales manager.

Q. And how long were you the new car sales manager thereafter? A. Until my dismissal May 15, 1961.

185a Q. Were you fired at that time? A. Yes, sir.

Q. And who fired you? A. Mr. Ferrell.

Q. Now, following your dismissal by the Respondent in May, 1961, did you go to work thereafter for another employer? A. Yes, sir.

Q. And for whom did you go to work at that time? A. Southwest Chevrolet, Inc.

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187 Q. (By Mr. Grabemann) Will you tell us, please, to the best of your recollection, Mr. Frachalla, what was said at that time by Mr. Burns and what was said by you, if anything? A. Again I walked over to my desk with Andy, one of us was behind the front. I don't remember that well, but I do remember sitting at the desk and engaging in some short conversation and Andy Burns telling me "did you know Mr. Ferrell let you go to suit me?"

Q. This was said by Mr. Burns, is that right? A. Yes.

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188 Q. (By Mr. Grabemann) Now, during your employment at Southwest Chevrolet, Mr. Frachalla, were there other salesmen employed at Southwest who had previously worked for the Respondent at the same time that you were working there? A. Yes, sir.

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191 Q. (By Mr. Grabemann) Mr. Frachalla, did you have a conversation with Mr. Barcelona while the two of you were employed at Southwest Chevrolet in which conversation Mr. Burns was mentioned? A. Yes, sir.

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192 Q. (By Mr. Grabemann) Now, when did that conversation take place, to the best of your knowledge, Mr. Frachalla? A. In the summer of 1961.

Q. Will you tell us, please, what Mr. Barcelona said to you at that time and what you said to him, if anything, with reference to Mr. Burns? A. Mr. Barcelona reminded me of the difference we had on one occasion at Ferrell-Hicks. He came to me and told me he was apologizing for being what he termed jealous because of my being over attentive to another salesman named Joe Wentz, and he told me the reasons jealously was aroused was the fact that Andy would remind him of any favor Andy thought I was passing over to Joe Wentz, and he objected to it.

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193 Q. Now, at about that time, did you also have occasion to talk to Joe Wentz? A. Yes, sir.

Q. And did you have an occasion to talk to Joe Wentz with reference to Mr. Burns? A. Yes, sir.

Q. Will you tell us, please, what Mr. Wentz said to you and what you said to him, if anything, with reference to Mr. Burns? A. We would, from time to time, have a lot of loose time on our hands, and of course, we'd engage in conversation. Mr. Wentz told me that at the time I was sales manager for Ferrell-Hicks Chevrolet, on many

occasions Mr. Burns would get together with two or three salesmen and pick apart the job I was doing.

Q. Did Mr. Wentz tell you that on more than one occasion? A. Yes, sir.

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227 Q. (By Mr. Grabemann) On May 10, 1962, Mr. Frachalla—. Strike that. On May 10, 1962 what happened on that day, if anything, with reference to you, Mr. Haggerty, and Mr. Burns? A. We agreed in unison because of the nature of the reasons that concerned both Haggerty and myself and because of the statement Mr. Burns had made in the past that Mr. Ferrell fired me to suit him. We agreed that we would release him together. He would be let go from Ferrell-Hicks and we agreed to do it at one time.

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Q. (By Mr. Grabemann) Was there any reason why you decided to talk to Mr. Burns together? A. Yes.

Q. Will you tell us, please, what the reason was? A. I was going to fire Andy Burns and because he would doubt my authority to do it, Jack was there to back it up, and the reason I wanted this opportunity to fire Andy Burns — he told me Mr. Ferrell told him I was
228 fired to suit him. I felt that Andy Burns was giving me more aggravation and I didn't want any. I felt that this was my chance to fire a man that had caused me to get fired.

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234 Q. (By Mr. Grabemann) What, if anything, did Mr. Burns' union or concerted activity have to do with the decision to discharge him? A. Absolutely nothing.

Q. Prior to Mr. Burns' discharge and after you were re-employed by the Respondent in March, 1962, did Mr. Ferrell ever say anything to you about Mr. Burns' union or concerted activities? A. I don't follow that question.

Q. After you were rehired by the Respondent in March, 1962, did Mr. Ferrell ever say anything to you about Mr. Burns' union activities? A. I don't think so.

Q. Did Mr. Haggerty ever say anything to you
235 about Mr. Burns' union activities during that same time period? A. I think Mr. Burns' union activity was common knowledge. Nobody could tell me nothing. I didn't place any importance.

Q. Did Mr. Haggerty ever say anything to you concerning it? A. Nothing concerning it.

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269 **Alvin Herman**

was called as a witness by and on behalf of Respondent, and having first been duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Grabemann) What is your business, please, Mr. Herman? A. I am a salesman.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet, Inc.

273 Cross Examination

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284 Q. Now, relating to this sales meeting, when did you say it occurred? May what? A. On or about the beginning of May somewhere.

Q. You don't remember the exact date of the sale? A. It was around—. To me it's about the right date.

Q. What? A. It looks to me like it was the 9th.

Q. About what time did it occur? A. Sales meeting?

Q. Yes. A. About 9:15. We get together.

Q. Now, what room was this in, Mr. Herman? A. Across the street behind the used car showroom and behind the insurance office.

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288 Trial Examiner: How big is this room where you had the meeting?

The Witness: It's about the length of this one and it's wider to the corners. It goes around the toilets.

Trial Examiner: And you were sitting, you say, at one end?

The Witness: I was sitting at that corner. (Indi-
289 cating)

Trial Examiner: Where was Mr. Burns sitting?

The Witness: Mr. Burns was sitting here. (Indicating) There's a filing case and there's a table there. He was sitting against this wall. (Indicating)

Trial Examiner: I thought you said he was at the other end of the room from where you were?

The Witness: I meant across the room. Yes, sir.

Trial Examiner: How far away were you from him approximately?

The Witness: I would say twelve feet, ten feet.

Trial Examiner: And how far away was Mr. Burns from Mr. Haggerty?

The Witness: Twenty feet, eighteen.

Trial Examiner: Did Mr. Burns—did he make his remark loud enough so Mr. Haggerty could hear it?

The Witness: Yes, sir.

Trial Examiner: So that everybody heard it?

The Witness: Yes, sir.

Trial Examiner: Did Mr. Haggerty say anything about that when that remark was made?

The Witness: Mr. Haggerty couldn't say anything.

Trial Examiner: I'm asking you did he?

The Witness: No, sir.

Trial Examiner: Why couldn't he?

The Witness: He was laughing.

290 Trial Examiner: How's that?

The Witness: He made so much noise laughing. We all busted out laughing.

Trial Examiner: That's all.

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307 **Alma Klinnicke**

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Direct Examination

Q. (By Mr. Grabemann) What is your business, Mrs. Klinnicke? A. I am a business manager.

Q. And with what firm are you associated? A. Ferrell-Hicks Chevrolet, Inc.

Q. How long have you been associated as business manager for Ferrell-Hicks? A. Well, approximately 12 years, ever since they've been in business.

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329 **Jack Haggerty**

was called as a witness by and on behalf of Re-
330 spondent, and having first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Grabemann) What is your business, Mr. Haggerty? A. The automobile business.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet.

Q. How long have you been associated with Ferrell-Hicks? A. I went to work for them in 1961.

Q. And in what capacity are you employed by Ferrell-Hicks? A. As a new car sales manager.

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340 Q. Now, Mr. Haggerty, on the following day, were you working that day? A. No, Thursday is normally my day off.

Q. Did you come down to the Respondent's place of business? A. Yes, I did.

Q. And for what reason did you come down to the Respondent's place of business on your day off? A. Well, the principal reason I came down was to sit down with

Tom Frachalla, call Andy Burns in the office, and to leave him go.

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342 Q. Now, Mr. Haggerty, what, if anything, did Mr. Burns' union or concerted activity have to do with his discharge?

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343 The Witness: Absolutely nothing.

Q. (By Mr. Grabemann) What authority, Mr. Haggerty, do you have with reference to the hiring and firing of employees? A. Complete.

Q. What do you mean by complete authority? A. I can hire or fire any employees.

Q. And do you have to consult with anyone in order to exercise that authority? A. If the employees are in a different department, I always consult with the manager of that department before we do it.

Q. Have you ever fired employees in different departments than the new car sales department? A. Yes.

Q. Have you ever consulted with Mr. Ferrell with reference to any firings engaged in by you? A. No, I have not.

Q. Have you ever consulted Mr. Ferrell with reference to any hires that were made by you? A. Only with Tom Frachalla.

Q. Now, Mr. Haggerty, do you know whether or not the Respondent has a collective bargaining relationship with any other labor organizations? A. Yes.

344 Q. And how many different labor organizations does the Respondent have a collective bargaining relationship with? A. With three.

Q. And has that relationship with those three organizations existed for some years as far as you know?

Mr. Lennon: I object.

Trial Examiner: You may answer.

The Witness: Yes, it has. No problems.

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347 Q. Now, prior to the NLRB election that was held at the Respondent's place of business around December 20, 1961, did you and Mr. Burns ever engage in any conversations concerning a union? A. Yes.

Q. And how many different times were there when a conversation was engaged in between the two of you concerning a union? A. This is before the election?

Q. Before the election. A. We talked twice explicitly about the Union.

Q. Before the election? A. Yes.

Q. Now, on one occasion was there any discussion concerning the purpose of the Union? A. Yes, the first.

Q. Now, when did that conversation take place?

348 A. Approximately October.

Q. That would be October of 1961? A. Yes.

Q. And on that occasion how did Mr. Burns come into your presence? A. Andy was on the floor and he was not busy and I said, "Andy, come here for a minute" and he walked over and he came in the office.

Q. And you then talked to Mr. Burns about the Union, is that right? A. Yes, I did.

Q. Will you tell us, please, what was said at that time by you and what was said by him, if anything, regarding the Union? A. Well, I asked Andy, I said, "What is the purpose of the Union? What can it do for Ferrell-Hicks? What can it do for the salesmen? What can it do for me"? And Andy went through it and he explained what the Union—what the Union was.

Q. And was anything else said then in that connection? A. Yes, I told Andy at that time, after he explained to me about the Union and all about it, I said, "Andy," I said, "If you think the Union is what you want, if you think it's for the men and for the betterment of the men and

349 you honestly believe this to be true," I said, "You are bound morally to follow it up and stay with it." I said, "You never will feel right the rest of your life if you didn't do it."

Q. Now, on another occasion prior to the election in

December of 1961 did you and Mr. Burns engage in any conversation concerning a Tom Haggerty? A. Yes.

Q. Now, will you tell us, please, where that conversation took place? A. It took place in my office.

Q. And who is Tom Haggerty? A. Tom Haggerty is my nextdoor neighbor and a very personal friend of mine. He's also secretary-treasurer' of the Milk Driver Union.

Q. Is that a Teamster union? A. Yes, it is.

Q. And that's secretary-treasurer of a Teamster union here in this city? A. Yes, it is. He is the man who ran against Jimmy Hoffa about four or five years ago.

Q. Now, yes. Now, on that occasion, Mr. Haggerty, will you tell us, please, what was said by you and Mr. Burns?

A. Andy was in my office and waiting. There was
350 time to spare and I asked Andy, I said, "How's the Union going?" He said, "Boy, you should be for it being a good friend of Tom Haggerty." I said, "Well, certainly, Andy. I have nothing against the Union," and I said, "As you know, Tom Haggerty is a real good friend of mine, even more than you think. You don't realize but our wives are together every day."

Q. Was anything else said at that time? A. I explained it to him. I was friendly with Tom Haggerty and I thought I explained I didn't have anything against the Union. Actually, I told him this: I said, "I don't think that we need a union at Ferrell-Hicks" and then he explained to me that actually, they're other places that need a union. I said, "Possibly, Andy, there are." I said, "I have nothing against the Union." That was basically the conversation.

Q. Now, apart from the two conversations that you had with Mr. Burns prior to the election in December, 1961, were those the only two occasions, then, during which you talked to Mr. Burns concerning a Union? A. Andy Burns was in my office two or three times a day, unless it was his day off, and there might have been times in there that for lack of conversation I'd say, "How's the Union?" He said,

"Fine, Jack," and comments like that, but no ex-
351 tended conversation and no facts either one way or the other.

Q. Now, the only time you called him into your office, as I understand, then, prior to the election, concerning any Union discussion was the first time in October, is that right? A. That's the time I asked him to explain the Union to me and tell me what it was so I would understand it first hand.

Q. Now, with reference to that conversation, have you given us the full conversation that transpired at that time between you and Mr. Burns? A. I think I've given you most of it. I have to probably think back.

Q. As far as you can recall now. A. As far as I can recall, there probably were things. He expanded on the Union and how it was going to do good for the men and the conditions that other dealerships and went through that and told me that.

Q. Now, with reference to the second occasion where Tom Haggerty was discussed, have you given us the full conversation? A. To the best of my knowledge, I have.

Q. Now, when, if ever, Mr. Haggerty, did you tell Mr. Burns to drop the Union? A. I never told him to drop the Union. Just the opposite.

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360 **Alma Klinnicke**

was called as a witness by and on behalf of Respondent, and having been previously duly sworn, was examined and testified further as follows:

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361 Further Redirect Examination

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371 Q. (By Mr. Grabemann) I hand you now, Mrs. Klinnicke, what has been marked Respondent's Exhibit 4 for identification and I ask you whether that is the particular correspondence that you received on or about July 31, 1962? A. Yes.

Q. Now, following the receipt of this correspondence, what happened next, if anything? A. I mailed it to the attorney's office.

Q. And did you thereafter have a conversation with Mr. Murphy? A. Yes, I did, and they said that we would have to appeal the case on a certain date or he would receive unemployment, and I said, "Well, that isn't the point. We don't care if he receives unemployment. We never have cared if he received unemployment. All we wanted to do was go on record that he was not discharged because of Union activities."

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373 **Jack Haggerty**

was recalled as a witness by and on behalf of Respondent, and having been previously duly sworn, resumed the stand, was examined and testified further as follows:

Direct Examination (Cont'd)

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374 Q. (By Mr. Grabemann) Going back once again, Mr. Haggerty, to the conversation you had with Mr. Frachalla on the evening of May 9, 1962, do you recall anything further that was said between you and Mr. Frachalla other than what was said yesterday by you?

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375 The Witness: We decided that Andy was trying to divide management by his comments to Tom Frachalla to beware of Jack Haggerty and his comments to me to look out for Tom Frachalla. We knew he was trying to split us up and he had Tom Frachalla fired once and it looked to us like he was trying to have it done again or possibly have me fired, and it was either we either—we had to leave him go in fear of our own jobs or ruining our organization completely, and with this in mind it was very—a fear we had for our own jobs was very important in our decision to leave Andy Burns go.

Q. (By Mr. Grabemann) Do you recall anything else that was said at that time? A. We also brought—I also—Tom also mentioned the fact at that time of how Andy Burns not only was trying to separate us in management

but also berated Mr. Ferrell again and the fact that Andy bragged about backing Mr. Ferrell into a corner.

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385 **Bert M. Ferrell**

was called as a witness by and on behalf of Respondent, and having been first duly sworn, was examined and testified as follows:

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Direct Examination

Q. (By Mr. Grabemann) What is your business Mr. Ferrell? A. Automobile business.

Q. With what firm are you associated? A. Ferrell-Hicks Chevrolet.

386 Q. What capacity are you associated with the Respondent? A. General manager.

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392 Q. (By Mr. Grabemann) Now, prior to the election in December, 1961, Mr. Ferrell, did you have a conversation with Mr. Burns with reference to his having started the Union? A. Yes, sir.

Q. All right. Now, when did that conversation take place, to the best of your recollection? A. Well, it was about a year ago, it seems to me like. I wouldn't say exact but it's about that time.

Q. Now, where did the conversation take place? A. In my office.

Q. Will you tell us, please, what was said at that time by Mr. Burns and what was said by you, if anything? A. Well, Andy come in my office and he sat down and he was outlining the Union situation, telling me what he was going to do. He said what the Union would do for me and how much it improved the business and everything and

393 I said, "Andy, I don't have no qualms with you. You no better than that." I said, "I don't know what you want to go into all this with me for" and he was talking on and I said, "Andy, the only thing I hold against you is you didn't come to me like the rest of these guys when they wanted help. You should have come to me and

told me you was going to go in business and I would have give you a leave of absence for a couple months, three months, or whatever you want. I could have maybe helped you that way."

Q. Did he say anything to you at that point? A. Yes, he told me that he had different deals for different dealers. That he had different deals for different dealers.

Q. Did he say anything to you with reference to his possibly being fired? A. Yes, he told me, he said, "Well, you would fire me." I said, "No, Andy." I said, "I'd never fire you for that. I can't blame a man for wanting to better himself." I said, "I come up the hard way and I know what it is to try to get up in the world" and I said, "I'd never fire a man for trying to better himself, and the fact is I'll help you all I can and I still tell you that. I have no qualms with you at all."

394 Q. Now, Mr. Ferrell, did you say to Mr. Burns at that time that you would not have fired him because he was too good a productive man? A. No.

Q. Was there any mention in that conversation concerning other unions at your place of business? A. Yes. I told him, I said, "Andy," I says, "Jesus, you know me better than that. I got three unions in here now." I said, "Lord, why would I object to a union?" I said, "I got three up here above the scale. I don't have no objection. Good Lord. Everything we do is above the scale on the unions." I says, "They—nothing new to me. I don't have no objections."

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396 Q. Now, Mr. Ferrell, when in 1961 was an announcement first made with reference to Christmas bonuses? A. Well, right after we changed the pay plan.

Q. And when was that? A. I believe it was in April or May.

Q. Now, subsequent to the announcement at the time of Christmas bonuses, did you have occasion thereafter to

again refer to that matter? A. Yes. I told the salesmen, I said, "Well, Jack Haggerty had so many customers coming in and they wanted to buy cars from him. It looked kind of ridiculous to let Jack sell all the cars." I told the salesmen any house deals in now in the kitty—would be in the pot, we are going to put $10. That's the first deal."

Q. This was said in April or May is that right? A. Yes, that's right. So, then, later on someone asked me how much money we had in the kitty. I said, "Well, we must have a lot in there." So, I went over and checked to be sure after one of the salesmen asked me, and I didn't have as much as I anticipated I'd have, so I went back out there and I said, "Well," I said, "I guess I'm going to
397 have to raise the kitty on the bonus because we are not as good as I thought we were. I'll just make it $20" because business was really good for the house and honest, it was good. We've been pretty liberal with our employees.

Q. Now, Mr. Ferrell ,when was the kitty raised from 10 to $20 per house deal? A. Well, I think it was along in October. I think in October.

Q. And what was the state of business at that point? A. Well, business—. Well, the gross profit was really up then and we was selling quite a few more cars than anticipated selling.

Q. Now, do your books and records reflect that fact? A. Yes, they do.

Q. And are those books and records available for anyone that wants to see them at this hearing? A. Yes, sir.

Q. Now, at the time that there was mention made of raising the kitty from 10 to $20, was anything said by you concerning a Christmas party? A. Yes, it was. I said, "Well, business is getting pretty good." I said, "Guess we'll have to have a Christmas party" or "I'll take you guys that don't want to go to the Christmas party—I'll

take you duck hunting with me" and they said—I
398 said, "Take a vote on it," so they took a vote on it and decided they'd have a Christmas party. So, then, we scouted around and found out where we could have the Christmas party and we found out we could have it at the Mangram Chateau.

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402 Q. Did the new car sales manager or the used car sales manager consult you with reference to hiring of employees? A. No, sir.

Q. Have they ever consulted you with reference to hiring employees? A. Maybe once or twice, like Tom Frachalla when he was re-hired.

Q. Now, with reference to firing employees, need
403 the new car manager or the used car manager consult you before an employee is fired? A. No.

Q. And in practice have they ever consulted you before firing an employee? A. No, sir.

Q. You don't require them to do that? A. No, sir.

Q. And never have? A. No, sir.

BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,054

ANDREW BURINSKAS, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review and Set Aside An Order of the National Labor Relations Board

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STATEMENT OF QUESTION PRESENTED

As set forth in the prehearing conference stipulation, the question is:

Whether the National Labor Relations Board's dismissal of the General Counsel's complaint alleging that the employer, Ferrell-Hicks Chevrolet, Inc., violated the Act in discharging the petitioner, Andrew Burinskas, was proper.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,054

ANDREW BURINSKAS, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review and Set Aside An Order of the National Labor Relations Board

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Andrew Burinskas to review and set aside a final order of the National Labor Relations Board (herein called the Board) dismissing a complaint alleging that petitioner was discriminatorily discharged. This Court has jurisdiction under Section 10(f) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. §§ 151 *et seq.*), petitioner being a "person aggrieved" by the denial of relief.

We deem it appropriate at the outset to acknowledge the limited scope of the review sought. The "mere fact that the Board disagreed with the Examiner does not require reversal"; and, as between conflicting inferences, the

Board has "the right to make the choice giving consideration to the examiner's report." *International Woodworkers of America* v. *N.L.R.B.*, 104 U.S. App. D.C. 344, 345, 262 F. 2d 233, 234 (1958). On the other hand, the propriety of the Board's decision must be judged "solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962); *Local 833, UAW-AFL-CIO, etc.* v. *N.L.R.B.*, 112 U.S. App. D.C. 107, 113, 300 F. 2d 699, 705 (1962), *cert. den.*, 370 U.S. 911. We seek review because, in our judgment, the grounds which the Board invoked for reversing the Examiner and dismissing the complaint are inadequate and improper. *Fruit and Vegetable Packers and Ware. Local 760* v. *N.L.R.B.*, ... U.S. App. D.C. ...., 316 F. 2d 389, 391-392 (1963).

STATEMENT OF THE CASE

Upon a charge filed by petitioner, a complaint was issued charging that Ferrell-Hicks Chevrolet, Inc. (herein called the Company) discriminatorily discharged petitioner because of his union membership and activity as chairman of the organizing committee of the Automobile Salesman's Union of Chicago and Vicinity (herein called the Union), in violation of Section 8(a)(3) and (1) of the Act (I.R. 1, 2).[1]

The Trial Examiner concluded that petitioner's discharge was discriminatory (I.R. 8). Basic to the Examiner's conclusion were his specific findings based on demeanor

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[1] "I.R." will be used herein to refer to the Intermediate Report of the Trial Examiner and "D.O." to refer to the Decision and Order of the Board. Pursuant to the prehearing conference stipulation, the Joint Appendix will not be printed until after briefs are filed, and the parties are permitted to refer to the pages of the original record.

that the two Company officials responsible for the discharge testified falsely when they asserted that the discharge was based on various non-discriminatory reasons (I.R. 7).

The Board accepted the Examiner's "resolutions of credibility based on demeanor" (D.O. 1), thereby adopting his findings discrediting the testimony of the two Company officials. It also found that the Company "undoubtedly preferred" that its salesmen remain unorganized (D.O. 3). Nonetheless, by a two-to-one vote, Chairman McCulloch dissenting, the Board dismissed the complaint on the apparent ground that the evidence failed to show a sufficient degree of Company animus against the Union to warrant finding such animus a factor in the discharge (D.O. 3-4).

The pertinent facts as found by the Examiner, whose subsidiary findings were not disturbed by the Board, are as follows:

Petitioner's Union Activities and Company Action Prior to the Election

Petitioner Andrew Burinskas (also known as Andy Burns) was employed by the Company, a Chicago automobile dealer, as an automobile salesman from September, 1955, until his discharge on May 10, 1962 (I.R. 1, 2). It is undisputed that he was an excellent salesman, one of the Company's best (I.R. 6). Petitioner had for several years preceding his discharge achieved membership in Chevrolet's Hall of Honor Club for salesmen and had been awarded numerous prizes (I.R. 6). In 1961 he was awarded the second largest Christmas bonus among the Company's salesmen (I.R. 6). Even at the moment of his discharge, petitioner was assured by Company officials that there was nothing wrong with his work and that he was a "wonderful salesman" (I.R. 5).

In July, 1961, petitioner joined the Union and became chairman of its organizing committee. In this role, he solicited for members among the salesmen of many auto

dealers in the Chicago area, including the Company. Petitioner's signature appeared on the Union literature which was widely circulated in the organizing drive. (I.R. 2.)

Ultimately, petitioner filed representation election petitions with the Board covering units of salesmen at five auto dealerships, including the Company. He participated actively in, and testified at, the consolidated Board hearings on the petitions. Bert Ferrell, the Company's president, testified in opposition to the petitions. On November 27, 1961, the Board's Regional Director directed elections on all the petitions. The election date was later set for December 20, 1961. (I.R. 2.)

At about the time the Company was to have posted election notices, petitioner reminded Ferrell that this had not yet been done. Ferrell replied that he had just received the notices and that he had no objection if petitioner posted them. As petitioner was posting one of the notices on a glass partition not far from Ferrell's office, Ferrell passed by and, looking at petitioner, said "No s— of a b— is going to tell me how to run my business." (I.R. 2.) Petitioner, evidently not having heard the remark, asked Ferrell to repeat what he had said. Ferrell looked at petitioner and repeated his remark word for word. (I.R. 2.)[2]

On Monday, December 18, 1961, less than two days prior to the election, the Company held a Christmas party at which it distributed bonuses to the salesmen.[3] The party

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[2] Ferrell admitted making the remark but said that he was referring to a customer with whom he had argued on the telephone shortly before (I.R. 2). The Trial Examiner did not credit this explanation; nor, it appears, did the Board (I.R. 2; D.O. 2).

[3] There was evidence, not mentioned by the Examiner, that around the end of November, 1961, perhaps three weeks prior to the election, Ferrell announced that the amount of money in the bonus pool would be doubled (tr. 21, 23; see tr. 396-397). The reasons asserted for this action were that business was good and that the amount of money in the bonus pool was unexpectedly small (tr. 21, 396-397).

had originally been scheduled by the Company for the following night—the night before the election—but when petitioner learned about this date, he advised Ferrell of a Board rule which he said prohibited holding the party within 24 hours of the election. Ferrell made a telephone call and later told petitioner that he was correct and that the party would be held on Monday night instead. When petitioner asked why the party was not to be held on the preceding Friday or Saturday, Ferrell said that he thought "the men [would] enjoy it on a Monday". (I.R. 2-3.)

The Company also sent a letter to its salesmen, other than petitioner, at the time of the Christmas party, which referred to the relationship between it and the salesmen as a "marriage" which should not be broken up by a third party (I.R. 3).[4]

In the course of the election on December 20th, petitioner, observing Ferrell instructing the salesmen to cast their votes, said "Get that s— of a b— out of here" (I.R. 3). This remark, made in the presence of Isabel LeBan, the Company bookkeeper, was conveyed almost immediately to Jack Haggerty, the new car sales manager (I.R. 3).[5] Nothing, however, was said to petitioner (I.R. 6).

The Union was defeated in the elections held at the Company. In two other dealerships, however, the salesmen voted in favor of the Union. (I.R. 3.)

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[4] Although not mentioned by the Examiner, there was undisputed evidence that prior to the election Jack Haggerty, the Company's new car sales manager, called petitioner into his office on several occasions to discuss the Union (tr. 30-32, 347-351). Petitioner testified that in early December, 1961, two weeks or so prior to the election, Haggerty tried to persuade him to drop the Union, and Haggerty admitted telling petitioner that "I don't think that we need a Union at Ferrell-Hicks" (tr. 30-31, 350). Petitioner also testified that shortly before the election Ferrell asked "why did you get started in this Union deal?" (tr. 15).

[5] Petitioner denied making the remark (tr. 132), but the Examiner credited the Company's testimony to the contrary (I.R. 3).

Petitioner's Post-Election Union Activities

On the morning following the election, Ferrell told petitioner to "forget" the election and that he had instructed the salesmen not to "tease" petitioner about it (I.R. 3). Petitioner replied that he was "hurt" by the results and that "it was [the Company's] money that beat him [him]" (I.R. 3).

Shortly thereafter, since elections were to be held at several other dealerships, petitioner prepared and signed a circular entitled "Keep the Ball Rolling," in which he argued for continuation of the Union's organizing campaign (I.R. 3). This circular also stated as follows (I.R. 3):

> "The results of the first five elections are in. The results are encouraging. Your Union of Automobile Salesmen now has a nucleus on which to build for the future.
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> • • •
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> "The election losses point up some interesting facts: Ferrell-Hicks [the Company]—the regular professional auto salesmen were for the Union, the newly hired, come lately 'salesmen' were against the Union. The election was lost 12 to 8. A switch of three votes would have meant a union victory. Ferrell-Hicks at the time of filing for the election only employed 12 salesmen. By election time 20 salesmen were on the floor."

Petitioner mailed copies of the circular to all members of the Union and personally distributed copies to the Company's salesmen (I.R. 3).

When Haggerty saw a copy of the circular, he called petitioner into his office. He said that he thought that petitioner was "through" with the Union. Petitioner replied in the negative and indicated that he was going ahead with elections at other dealerships later that month (I.R. 3-4).

In January, 1962, the Union prepared wage proposals to be submitted to the four dealers where it had won the elections.[6] Copies of these proposals were mailed to Union members and were circulated by petitioner among the Company's salesmen. Haggerty saw the proposals and told petitioner that "it was economically impossible for a dealer in the Chicago area to pay that amount of money to their salesmen and stay in business" (I.R. 4).[7]

In early May, 1962, a week or so prior to petitioner's discharge, Haggerty inquired of petitioner as to the Union's progress.[8] Petitioner replied that the Union's negotiations with the four dealers were being stalled by the dealers' evasive tactics and that the "government [was] going to start looking into this" (I.R. 4).

Events at the Time of Petitioner's Discharge

On the morning of May 9th, the day before petitioner was discharged, a regularly scheduled meeting of Company salesmen was held. Haggerty addressed the salesmen with regard to an incident which had occurred on May 7th, when Tom Frachalla, the Company's used car manager, had waited on, and sold a car to a customer to whom the salesmen on duty had allegedly failed to attend. This incident had occasioned dissatisfaction among the salesmen who complained to petitioner about Frachalla's action in taking a customer from an "up" (*i.e.*, the salesman entitled to the next customer entering the showroom), thereby depriving him of the commission on the sale (I.R. 4).

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[6] The Union won at two additional dealerships in the elections held on December 28, 1961 (tr. 38-40).

[7] There was also testimony, not mentioned by the Examiner, that Haggerty *again* asked petitioner if he was "through" with the Union and received a negative response (tr. 74-75).

[8] Although not mentioned by the Examiner, there was evidence that in the period subsequent to the election Haggerty regularly inquired of petitioner regarding the Union (tr. 45-48). See also, note 4, p. 5, *supra*.

When Haggerty mentioned this incident at the May 9th meeting, in discussing the need for improved sales technique, the salesmen expressed resentment concerning Frachalla's conduct. At the close of the discussion, petitioner remarked "Ah s—t, he's just trying to make a point" (I.R. 4). All of those present burst out laughing. Although Haggerty testified that petitioner's remark "ruined the whole effect" of his talk, Alvin Herman, a salesman who testified as a Company witness, said that Haggerty joined in the laughter (I.R. 4).[9]

Later in the day, petitioner told Haggerty that Frachalla's action "was a stinko" (I.R. 4). He added that Frachalla was "out to get [Haggerty's] job" (I.R. 4).[10] Haggerty shrugged off this remark, saying that he did not believe it (I.R. 7).

Frachalla testified that, since it was his day off, he did not appear at the Company's premises on May 9th until about nine o'clock in the evening, when he stopped by to check on whether "everything was in order in [his] department" (I.R. 5). He testified that he saw Haggerty leaving in his car and inquired as to the events of the day. According to their testimony, Haggerty told Frachalla that the incident of May 7th involving Frachalla's sale of a car had been "kicked around" at the sales meeting and also that petitioner had warned him to look out for Frachalla. Frachalla testified that, when he inquired further, Haggerty asked that he stop by at Haggerty's home later that evening (I.R. 5).

Haggerty and Frachalla met at Haggerty's home about 11 p.m. According to Haggerty's testimony, he related

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[9] Indeed, Herman's testimony was that Haggerty "couldn't" say anything following petitioner's remark since he was laughing (tr. 289). Herman said that "[Haggerty] made so much noise laughing. We all busted out laughing." (tr. 296).

[10] Frachalla had preceded Haggerty as new car sales manager, was fired from the job, and was rehired in March, 1962, as used car sales manager, a lesser job (see D.O. 3).

to Frachalla the incident at the sales meeting that morning and also petitioner's warning that Frachalla was out to get Haggerty's job. Frachalla testified that he then repeated to Haggerty a statement made by petitioner two months earlier, in March, 1962, referring to a "Haggerty dynasty" and that Haggerty "smile[s] with [his] teeth" but was insincere (I.R. 5). (Although Frachalla had solicited this evaluation of Haggerty, he advised Haggerty of petitioner's statement within minutes after it was made: Haggerty, however, had never reprimanded petitioner or mentioned the matter to him (I.R. 5, 6-7).) Haggerty testified that he next told Frachalla that petitioner had at the time of the election, almost five months earlier, called Ferrell a "s— of a b—". It was then decided by both men to fire petitioner the next morning (I.R. 5).[11]

Petitioner was not fired, however, until around five o'clock the following afternoon, when he was called into an office by Haggerty and Frachalla. Frachalla said that he did not quite know how to begin but that he understood that petitioner had made a statement about him to Haggerty; petitioner admitted that he had. Frachalla then referred to the statement made by petitioner to Frachalla about Haggerty, which petitioner also admitted. When petitioner asked "So what? Does this mean I'm fired?", Haggerty confirmed that it did (I.R. 5). Petitioner asked whether there was anything wrong with his work as a salesman, and Frachalla replied that petitioner was a "wonderful salesman" but that "that wasn't it" (I.R. 5). Petitioner then accused Frachalla of having "made a lot of statements," including an obscene reference to Ferrell, but the discussion ended when Frachalla left the office (I.R. 5).

Petitioner subsequently filed a claim for unemployment compensation. On July 31, 1962, the Division of Unemploy-

[11] The Board found that "[s]o far as the record shows, the decision to discharge [petitioner] was made and carried out by Haggerty and Frachalla alone" (D.O. 3).

ment Compensation of the State of Illinois determined that "it has not been shown that the claimant committed any act to cause dissension between employees" and that "[h]e was not discharged for misconduct connected with his work" (I.R. 5).

The Trial Examiner's Report

The Trial Examiner concluded that petitioner had been discharged discriminatorily and that the Company thereby violated Section 8(a)(3) and (1) of the Act. He recommended that the Company be ordered to cease and desist from its violations and to offer reinstatement and back pay to petitioner (I.R. 8-9).

With respect to the central issue of the Company's motive for the discharge, the Examiner noted that the Company was well aware of petitioner's activities for the Union; that the Company was opposed to organization of its salesmen; and that "human experience cautions that employers do not lightly dispense with the services of a top notch salesman" (I.R. 6).

The Examiner found that the reasons asserted by the Company—petitioner's disrespectful and allegedly divisive remarks directed at Company officials—were not in fact the reasons for the discharge. He stressed that the events alleged to constitute the cause for discharge were widely separated in point of time and that petitioner had not been warned or reprimanded with respect to any of these matters. Thus, the Examiner noted that although petitioner's reference to Ferrell as a "s— of a b—" occurred in December, 1961, and his statement to Frachalla regarding Haggerty in March, 1962, neither of these events was even mentioned to petitioner until the time of his discharge. With regard to petitioner's remark at the May 9th sales meeting, Haggerty failed to mention it to petitioner during a conversation held later the same day (I.R. 6-7).

The crucial testimony of Haggerty and Frachalla, who alone were responsible for petitioner's discharge, was specifically discredited by the Examiner. These witnesses had testified that they fired petitioner because of his disrespectful comments toward management and attempts to sow dissension among Company officials.[12] However, relying in large measure upon his observation of their demeanor on the witness stand, the Examiner found that Haggerty's and Frachalla's testimony was false and that their asserted reasons for discharging petitioner were pretexts for the actual reason, which was petitioner's activities for the Union (I.R. 6-8). Thus, the Examiner stated (I.R. 7):

> "On the entire record, I do not regard as worthy of belief the announced conclusion by Haggerty and Frachalla that Burns' [petitioner's] remark to Frachalla concerning Haggerty's lack of sincerity, and his remark to Haggerty that Frachalla was out to get his job, spaced more than 2 months apart, belong in the same category, or that they led to their conclusion that Burns was playing one against the other, and should be fired for that reason. Instead, consideration of the entire record, coupled with my observation of the demeanor of the witnesses involved as they testified, have brought me to the conclusion that they met clandestinely near midnight to concoct a defense having the appearance of legality, and to cover the true reason for Burns' discharge—his union activity."

In the Examiner's view of the case, the Company had hoped that petitioner would cease his union activities following his defeat in the Company election. But when petitioner's subsequent activities and statements to Haggerty made clear that he had no such intention, the Company decided to fire him as "the best and quickest way" to avoid organization of its salesmen (I.R. 8).

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[12] Haggerty and Frachalla expressly denied that petitioner's union activities motivated their action (tr. 234, 342-343).

The Board's Decision

The Board, by a 2-1 vote, dismissed the complaint, finding that the General Counsel had failed to prove by a preponderance of the evidence that petitioner's discharge was discriminatory (D.O. 4). Chairman McCulloch, dissenting, stated that he "would adopt the Trial Examiner's findings, conclusions, and recommendations in their entirety" (D.O. 4).

Although the Board majority reversed the Examiner's conclusion that the Company had violated Section 8(a)(3) and (1), it affirmed the various procedural rulings made by the Examiner in the course of the hearing and did not reverse any findings of fact made by him (D.O. 1). Most significantly, the Board stated: "we accept his [the Examiner's] resolutions of credibility based on demeanor . . ." (D.O. 1).[13]

Despite its acceptance of the Examiner's credibility findings based on demeanor—which, as the Examiner's report plainly shows, included the finding that Haggerty and Frachalla testified falsely as to their reason for discharging petitioner—and its own finding based on the evidence that the Company "undoubtedly preferred that its salesmen remain unorganized," the Board believed that there was insufficient evidence that the Company was "strongly opposed" to the Union to warrant finding such

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[13] The Board decision discusses an asserted reason for petitioner's discharge that was not mentioned in the Trial Examiner's report. Several witnesses testified that petitioner was reportedly responsible for Frachalla's discharge by Ferrell in 1961; and both Frachalla and Haggerty testified that they fired petitioner in part because they feared that he might in the future cause them to be fired (see D.O. 3; tr. 227-228, 375). Whatever the merits of this asserted reason—and it is difficult to understand why, if petitioner's influence with Ferrell was so great that he could bring about the discharge of high Company officials, Haggerty and Frachalla showed no hesitation in firing petitioner without even mentioning the matter to Ferrell (see tr. 343, 402-403)—it is evident that Haggerty's and Frachalla's testimony in this regard was discredited by the Examiner on the basis of demeanor, which finding was accepted by the Board (see I.R. 7; D.O. 1).

opposition a factor[14] in the discharge (D.O. 3). The Board stated (D.O. 3-4):

> "Whether the reasons which Respondent contends prompted it to discharge Burns are pretexts depends basically on a judgment that Respondent resented or feared Burns' activities on behalf of the Union. We are not convinced that Respondent was strongly opposed to the Union. It undoubtedly preferred that its salesmen remain unorganized, but it had already been successful in one election while a second could not be held for at least 7 months. At no time before or after the election did it engage in conduct violative of Section 8(a)(1). In view of its restrained attitude in the past toward Burns and the Union, we think it is mere speculation to infer from Burns' remark to Haggerty about other dealers being evasive that Haggerty would then decide that Burns intended to continue working to organize Respondent's salesmen, and should, therefore, be discharged as soon as possible. Consequently we conclude, contrary to the Trial Examiner, that the General Counsel has failed to establish by a preponderance of the evidence that the discharge of Andy Burns violated Section 8(a)(3) and (1) of the Act."

The Board did not elaborate on the type of evidence of Company opposition to the Union that it would deem sufficient. But its emphasis upon the absence of an independent violation of Section 8(a)(1) indicates that the Board considered unlawful manifestation of hostility to the Union a condition precedent to finding a violation of Section 8(a)(3).

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[14] Of course, Section 8(a)(3) is violated if union activity plays any substantial part in a discharge, even though there are also other operative reasons. *N.L.R.B.* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (1st Cir. 1953).

STATUTES INVOLVED

The pertinent sections of the Act are set out in the Appendix, pp. 23-24, *infra*.

STATEMENT OF POINT

The grounds invoked by the Board in dismissing the complaint were inadequate and improper.

SUMMARY OF ARGUMENT

A. The Board improperly ignored the necessary implications of the Examiner's finding, which it accepted, that Haggerty and Frachalla testified falsely as to their reasons for discharging petitioner. Since the non-discriminatory reasons asserted by the Company were those to which Haggerty and Frachalla testified, it follows inevitably that, if they testified falsely, the reasons asserted were not the real ones. This credibility finding, based on demeanor, not only negates the Company's defense, but by establishing that Company officials testified falsely it provides firm evidence that the actual motive was discriminatory. See *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (2nd Cir. 1952). The Board failed also to consider that evidence of discriminatory motive becomes vastly stronger upon rejection of the proferred non-discriminatory explanation. *E.g.*, *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (9th Cir. 1953). See *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 487 (2nd Cir. 1952).

B. In view of the finding that Haggerty and Frachalla testified falsely and, as a consequence, that the Company's explanation of the discharge must be discredited, the evidence of discriminatory motive could not reasonably be held insufficient. The Board accepted the Examiner's factual findings indicating Company opposition to unionization of its salesmen. The Company was aware of petitioner's key role in the effort to organize them. Although he was concededly an excellent salesman, petitioner was

discharged without warning, see *E. Anthony & Sons* v. *N.L.R.B.*, 82 U.S. App. D.C. 249, 253-254, 163 F. 2d 22, 26-27 (1947), *cert. den.* 332 U.S. 733, allegedly because of events which for the most part occurred months previously. In the absence of a credible explanation of the discharge, a finding of discrimination would not be "mere speculation" (D.O. 3), as the Board majority thought, but a proper inference firmly grounded upon evidence. See *Fruit and Vegetable Packers and Ware. Local 760* v. *N.L.R.B.*, —— U.S. App. D.C. ——, 316 F. 2d 389, 391-392 (1963).

C. The Board improperly insisted upon proof of an independent violation of Section 8(a)(1) or of overt Company hostility as a prerequisite to establishing a violation of Section 8(a)(3). But such direct proof is rarely available, *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F. 2d 291, 293 (4th Cir. 1940), and to require it is to enable circumspect employers to evade the statutory prohibition. The Board should be required to decide this case on the basis of the circumstantial evidence and not deny relief because there was no direct evidence that the Company intended to violate the Act. *N.L.R.B.* v. *Link-Belt Company*, 311 U.S. 584, 602 (1941).

ARGUMENT

THE GROUNDS INVOKED BY THE BOARD FOR DISMISSING THE COMPLAINT ARE INADEQUATE AND IMPROPER

A. The Board Improperly Disregarded the Necessary Implications of Finding That Haggerty and Frachalla Testified Falsely.

The Board was oblivious to the necessary implications of its acceptance of the Trial Examiner's finding that Haggery and Frachalla testified falsely as to their reasons for discharging petitioner.[15]

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[15] Whether the Board could properly have overruled the Examiner's credibility finding based on demeanor concerning the testimony of Haggerty and Frachalla need not be decided, since the Board has not done so. It should be noted, however, that under a long line of Board decisions it is established

Only Haggerty and Frachalla were responsible for petitioner's discharge and thus they alone knew the real motive for it (see D.O. 3). In asserting that non-discriminatory reasons formed the basis for the discharge, both testified falsely. The Examiner so found on the basis of demeanor, and the Board accepted his finding.

Since the non-discriminatory reasons asserted by the Company at the hearing were those to which Haggerty and Frachalla testified (see I.R. 6-7), it follows inevitably that, if their testimony was false, the reasons asserted were not the real ones. If those were not the reasons, the Company's defense to the charge collapses, for no other non-discriminatory reason was ever asserted.

The Board also overlooked the fact that not only does the discrediting of Haggerty's and Frachalla's testimony negate the Company's explanation of the discharge, but the fact that they testified falsely is itself strong evidence of unlawful motivation. For, if an employer's real motives are non-discriminatory, it is inconceivable that he will testify to a false explanation rather than reveal them.

The well-established rule is that testimony which demeanor discredits may prove the opposite of what the witness asserts. Judge Learned Hand, speaking for the

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policy that the Board will "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544, 545 (1950), enforced 188 F. 2d 362 (3rd Cir. 1951); *M & S Company*, 108 N.L.R.B. 1193 (1954); *Gala Electric & Machine Company*, 142 N.L.R.B. No. 30 (1963); *Baltimore Steam Packet Company*, 120 N.L.R.B. 1521 (1958). Even apart from Board policy, it is doubtful if the Board could properly set aside a Trial Examiner's credibility finding based on demeanor absent a very strong showing in the record as to its incorrectness. See *N.L.R.B.* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (2nd Cir. 1951); *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 742, 745-746 (2nd Cir. 1953); *Pittsburgh Des Moines Steel Company* v. *N.L.R.B.*, 284 F. 2d 74, 86-87 (9th Cir. 1960); *Deepfreeze Appliance Div.* v. *N.L.R.B.*, 211 F. 2d 458, 461 (7th Cir. 1954); *N.L.R.B.* v. *Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366, 368-369 (9th Cir. 1954).

court in *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (2nd Cir. 1952), said:

> "Moreover, such evidence [demeanor evidence] may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

Accord: *Anderson* v. *Knox*, 297 F. 2d 702, 726 (9th Cir. 1961), *cert. den.*, 370 U.S. 915.

That rule is applicable in Labor Board cases. In *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962), a recent discriminatory discharge case, the Supreme Court quoted Judge Hand's statement in *Dyer* with approval. See also, *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (9th Cir. 1953), *aff'd* 346 U.S. 482 (1953).

Moreover, it is "well settled" in discriminatory discharge cases that inferences of discriminatory motive "are strengthened by the fact that the explanation of the discharge offered by the respondent fails to stand under scrutiny." *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (9th Cir. 1953); *N.L.R.B.* v. *Bird Mach. Co.*, 161 F. 2d 589, 592 (1st Cir. 1947); *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 278 (5th Cir. 1962); *N.L.R.B.* v. *Abbott Worsted Mills*, 127 F. 2d 438, 440 (1st Cir. 1942); *N.L.R.B.* v. *Brezner Tanning Co.*, 141 F. 2d 62, 64 (1st Cir. 1944). For, absent a credible explanation, there is no alternative to inferring unlawful motivation.

In the instant case, the Board's adoption of the Examiner's finding that Haggerty and Frachalla testified falsely as to the reasons for the discharge means that their testimony cannot be used to support a finding that petitioner was discharged for the reasons they asserted; as affirmative evidence their "testimony must be ignored."

N.L.R.B. v. *Dinion Coil Co.*, 201 F. 2d 484, 487 (2nd Cir. 1952). Without it, there is no non-discriminatory explanation of the discharge, and the inference that the motive was discriminatory becomes overwhelming.

In ignoring these necessary consequences of finding that Haggerty and Frachalla testified falsely, the Board failed to base its decision, as it must, upon the record. See Sections 7(c), 10(e), Admin. Proc. Act, 5 U.S.C. §§ 1006(c), 1009(e); Section 10(e), (f), National Labor Relations Act, 29 U.S.C. § 160(e), (f); *N.L.R.B.* v. *Daniel Construction Company*, 281 F. 2d 875 (4th Cir. 1960).

B. In View of the Finding That Haggerty and Frachalla Testified Falsely and Therefore That the Company's Explanation of the Discharge Was False, the Evidence of Discriminatory Motivation Could Not Reasonably Be Held Insufficient.

If the Company's explanation of the discharge is discredited—as it must be if Haggerty and Frachalla testified falsely—it is quite irrational to reject the inference that animus against petitioner's union activity was, in part at least, responsible for it. The Board itself concludes that the Company was, to some degree, opposed to unionization of its salesmen. To say that the precipitous discharge of one of the Company's star salesmen without prior warning, and falsely explained, was wholly unrelated to his disfavored union activities is to flout both reason and experience.

The Board accepted the Examiner's factual findings that Haggerty repeatedly questioned petitioner as to his union activities; that Haggerty reacted adversely both to petitioner's continued participation in the Union after the election and to the Union's wage proposals; that Ferrell cursed petitioner for posting election notices; and that the Company gave a party at which it distributed bonuses to its salesmen (see *N.L.R.B.* v. *Exchange Parts Company*, 304 F. 2d 368 (5th Cir. 1963), *cert. granted*, 373 U.S. 931)

and sent an anti-union letter to them on the eve of the election (D.O. 2; I.R. 2-4).

The Company was aware that petitioner was "one of the leading union protagonists" (*N.L.R.B.* v. *Southern Desk Co.*, 246 F. 2d 53 (4th Cir. 1957)). As in *Sunshine Biscuits, Inc.* v. *N.L.R.B.*, 274 F. 2d 738, 742 (7th Cir. 1960):

> "[Petitioner] was the leader in the effort to organize. In the eyes of [the Company's] officials, he was a troublemaker. There is a solid basis in the evidence for the belief that they at first were not seriously concerned with [his] efforts, but as he persisted in the course obnoxious to them, they decided that he should be discharged."

Although he was concededly an outstanding salesman and the source of substantial income to the Company (D.O. 1; I.R. 6), petitioner was "discharged summarily, without preliminary warning, admonition or opportunity to change the act or practice complained of." *E. Anthony & Sons* v. *N.L.R.B.*, 82 U.S. App. D.C. 249, 253, 163 F. 2d 22, 26 (1947), *cert. den.*, 332 U.S. 773.

> "Such action on the part of the employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstances in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice, would be almost inevitable." *Ibid.* at 253-254; 26-27.

There was a lengthy interval between the discharge and events asserted to be the cause for it. As in *N.L.R.B.* v. *Jones Sausage Co.*, 257 F. 2d 878, 882 (4th Cir. 1958):

> "[The asserted cause] was not the real reason for [the dischargee's] layoff, because she was retained for two months thereafter and was dismissed immediately after her supervisor's conversation with her about her interest in the union."

A decision which labels these plain inferences of discriminatory motive "mere speculation" cannot be permitted to stand (D.O. 3).

We do not dispute that petitioner's conduct may have given offense — offense enough, aside from his union activities, to constitute "cause" for his discharge. But the existence of such cause merely raises, it does not decide, the issue of motive. The Examiner found, based on demeanor, that the Company officials responsible for the discharge testified falsely when they assigned nondiscriminatory reasons for it. If this finding stands, their testimony, and the Company's entire defense, must be disregarded. Having accepted this key finding of the Examiner, the Board could not rationally conclude that the evidence of discriminatory motive was insufficient. See *Fruit and Vegetable Packers and Ware. Local 760* v. *N.L.R.B.*, —— U.S. App. D.C. ——, 316 F. 2d 389, 391-392 (1963).

C. The Board Improperly Insisted on Proof of An Independent Section 8(a)(1) Violation or Its Equivalent in Overt Hostility As A Prerequisite to Establishing A Violation of Section 8(a)(3).

The heart of the Board's rationale appears to be its observation that it would be "mere speculation" to find a discriminatory motive where "[a]t no time before or after the election did [the Company] engage in conduct violative of Section 8(a)(1)" and the Board was "not convinced" that the Company was "strongly opposed" to the Union (D.O. 3-4). What the Board evidently missed was proof of a proclivity or intention on the part of the Company to violate the statute.

But such direct proof, while helpful, is rarely available, and to require it in Section 8(a)(3) cases is to enable

circumspect employers to evade the statutory prohibition. To insist upon direct proof of motive is "tantamount to holding that skillful concealment is an invincible barrier to proof." *United States* v. *Johnson*, 319 U.S. 503, 518 (1943).

> "Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, 'Use me', like the cake, bearing the words 'Eat me', which Alice found helpful in Wonderland." *F. W. Woolworth Co.* v. *N.L.R.B.*, 121 F. 2d 658, 660 (2nd Cir. 1941).

The Board cannot be allowed to blind itself to the reality that "direct evidence of a purpose to violate the statute is rarely obtainable . . .", *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F. 2d 291, 293 (4th Cir. 1940); that "direct evidence is seldom attainable when seeking to probe an employer's mind to determine the motivating cause of his actions." *N.L.R.B.* v. *Bird Mach. Co.*, 161 F. 2d 589, 592 (1st Cir. 1947). The Board should be required to decide this case on the "circumstantial evidence of discrimination and . . . not . . . deny relief because there was no direct evidence" of the Company's motives. *N.L.R.B.* v. *Link-Belt Company*, 311 U.S. 584, 602 (1941). See also, *N.L.R.B.* v. *Putnam Tool Company*, 290 F. 2d 663, 665 (6th Cir. 1961); *N.L.R.B.* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170, 172 (8th Cir. 1955), *cert. den.*, 351 U.S. 952.

Because it insisted on an improper standard of proof, the Board's dismissal of the complaint cannot stand.

CONCLUSION

For the foregoing reasons, the Board's order dismissing the complaint should be set aside and the case remanded to the Board for further proceedings consistent with this Court's opinion.

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APPENDIX

Statutes Involved

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Sec. 10 (e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court

shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REPLY BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,054

ANDREW BURINSKAS, *Petitioner.*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside An Order of the National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

The Supreme Court has recently cautioned that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . ." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962). The observation is particularly apt here, for Board counsel would substantially rewrite the Board's decision.

The proferred rationale of the Board's decision is as follows (Br. 10-11):

The Board did not believe that the Trial Examiner based his credibility finding as to Haggerty and Frachalla in part upon demeanor, and it rejected his explicit statement to the contrary. Since demeanor played no part, the Board was in as good a position as the Examiner to evaluate credibility on the basis of the cold record, and it properly reversed his credibility finding as to Haggerty and Frachalla.

Aside from the inescapable fact that the Board did not "articulate" this theory, there are several major flaws in Board counsel's analysis. First, the only way of determining how the Examiner reached his credibility resolutions is by examining his Intermediate Report. Board counsel say that the Report shows that the Examiner determined the credibility of Haggerty and Frachalla "upon his analysis of the undisputed facts in the record" (Br. 11). But the Report itself says that the Examiner did so by considering the record "coupled with [his] observation of the demeanor of the witnesses involved as they testified" (I.R. 7). The Examiner's own statement that he *did* rely upon demeanor is supported by the presumption of administrative regularity, and there is no basis whatever for rejecting or derogating it. See *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 229-231 (1947); *N.L.R.B.* v. *Jasper Chair Co.*, 138 F. 2d 756, 758 (7th Cir. 1943), *cert. den.*, 321 U.S. 777.

Second, the Board's unambiguous statement that it "accept[ed]" the Examiner's "resolutions of credibility based on demeanor" (D.O. 1) is likewise entitled to stand. The Examiner based only *one* credibility determination explicitly on demeanor, namely, the one relating to Haggerty and Frachalla. If the Board accepted any "resolution . . . based on demeanor," it was necessarily that one, since that was the only one to which its statement could refer. It

cannot be assumed, as Board counsel apparently would, that the Board was referring to some other Trial Examiner, some other Report and some other case.

Third, insofar as the Examiner's credibility determination was based upon demeanor, reversal of that finding by the Board would have required an overwhelming showing in the record that the finding was incorrect. As we have previously pointed out (Br. for Pet., fn. 15, pp. 15-16), it is established policy that the Board will "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544, 545 (1950), enforced 188 F. 2d 362 (3rd Cir. 1951). Moreover, the courts have refused to uphold the Board's reversal of an Examiner's credibility finding based on demeanor unless the Board has shown that its action is very strongly supported by the evidence of record. See *N.L.R.B.* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (2nd Cir. 1951); *Pittsburgh-Des Moines Steel Company* v. *N.L.R.B.*, 284 F. 2d 74, 86-87 (9th Cir. 1960); *Deepfreeze Appliance Div.* v. *N.L.R.B.*, 211 F. 2d 458, 461 (7th Cir. 1954); *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743, 745-746 (2nd Cir. 1953). Cf. *Flack* v. *N.L.R.B.*, F. 2d , 54 LRRM 2526, 2528-2529 (7th Cir., decided November 7, 1963). But the Board's decision makes no effort whatever to demonstrate that the evidence of record warrants reversal of the Examiner's finding as to the credibility of Haggerty and Frachalla.

That the Board did not even undertake such demonstration confirms that it meant exactly what it said: it accepted, and did not reject, this finding.[1] The Board concluded that

[1]Board counsel appear to argue, with perfect loyalty but less than perfect logic, that the Board must have reversed the Examiner's credibility finding as to Haggerty and Frachalla because otherwise its conclusion that petitioner was not discriminatorily discharged could not be sustained (see Br. 10).

even though Haggerty and Frachella had testified falsely, the evidence of anti-union motive was insufficient as a matter of law. Thus, it said (D.O. 1):

> "The Trial Examiner credited Burns' [petitioner's] testimony in many respects and discredited Respondent's witnesses who testified otherwise. Although we accept his resolutions of credibility based on demeanor, we are not required thereby also to adopt his conclusion that Burns was discharged because of Respondent's opposition to his activities on behalf of the Union."

The Board's rationale for rejecting the Examiner's conclusion cannot, as we have shown (see Br. for Pet., 15-21), be sustained. And Board counsel's impermissible attempt to impute a new rationale to the Board serves only to reinforce our position.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the Board's order dismissing the complaint should be set aside and the case remanded to the Board for further proceedings consistent with this Court's opinion.

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SUPPLEMENTAL BRIEF FOR PETITIONER IN NO. 18,054

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,054

ANDREW BURINSKAS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
FERRELL HICKS CHEVROLET, INC., *Intervenor*

No. 19,222

FERRELL HICKS CHEVROLET, INC., *Petitioner*

v.

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On Petition to Review and Set Aside and Cross-Petition to Enforce an Order of the National Labor Relations Board After Proceedings Pursuant to Remand

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SUPPLEMENTAL BRIEF FOR PETITIONER IN NO. 18,054

We shall not burden the Court with matter adequately covered in our brief in No. 18,054 and in the Board's brief in support of its decision pursuant to remand. In our opinion only the following matters warrant comment.

I.

The Company, like former Member Leedom, argues in effect (Br. pp. 35-36) that the Trial Examiner's finding that Haggerty and Frachalla lied about their reasons for discharging Burinskas did not come to the Board encased in the armor of the Examiner's observation of their demeanor because it is not a finding of fact but a "*legal* conclusion." The argument confuses a fact with its legal consequences. That Burinskas was not discharged for the reasons asserted by Haggerty and Frachalla is a fact, regardless of the inevitability of the consequent inference that he was discharged for union activity and of the legal conclusion that his discharge was therefore illegal. *NLRB* v. *Universal Camera Corp.*, 190 F. 2d 429 (2 Cir.). Where, as here, a finding that the assigned reasons are not the true ones is a "primary inference" or "testimonial inference" (*ibid.*, at p. 432, Frank, J. concurring), based in part upon observation of the witnesses, that finding is indisputably governed by the rule that "an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded." *Ibid.*, at 430.

II.

The Company's belated attack upon the remedial features of the Board's order is unquestionably barred by unexplained and inexcuseable failure to raise these objections either before or after its proposed adoption. *Labor Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322-323. Had the Company objected, Burinskas would have had opportunity to reply and the Board to explicate its rationale, permitting review of the order without further delay. Failure to object led the Board to believe that the Company's sole concern was with the proposed reversal of the prior decision; accordingly, it addressed itself only to that. To entertain objections to provisions of the order now would sanction piecemeal attack, necessitate yet another remand, and burden the administrative and reviewing process with

still further delay, rewarding the Company's wilful or negligent failure to make timely objection as Section 10(e) requires, at the expense of the victim of its unfair labor practices.

The attack on the reinstatement provision, in any event, is merely a semantic reformulation of the attack upon the findings, for that provision does no more than restore the employment relation which, until the Company's illegal reaction to Burinskas' union activity, it maintained despite Burinskas' faults.

The charge of arbitrariness in failure to toll back pay between the date of the Board's original order and the date of its order on remand is groundless. The Board has never followed the rule or policy of tolling in cases where its own finding of no violation is later reversed. In *A. P. W. Products Co., Inc.*, 137 NLRB 25, 29, enf'd. 316 F. 2d 899, 904 (2 Cir.), the Board explicitly noted that the prior general rule of tolling during the pendency of an exculpating Intermediate Report "quite inconsistently * * * does not appear to have been adopted as a general practice where a Trial Examiner has found an 8(a)(3) violation but the Board has not and, upon reversal by a United States Court of Appeals, the Board has thereafter ordered reinstatement and backpay."[1] In *A. P. W.*, the Board rejected tolling as a general policy in both classes of cases, but reserved power to toll in either "where the circumstances warrant it." 137 NLRB at 31, n. 10.

That the Board did not consider the Company's equities in this case sufficiently "unique" (*Kohler Co.*, 148 NLRB No. 147, 57 LRRM at 1156)[2] or "unusual" (*Fibreboard Paper Products Corp.*, 138 NLRB 550, 555, n. 21), to warrant an exception to its general non-tolling practice is

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[1] In affirming, the Second Circuit described the majority opinion as pointing "to the contrary practice where a Board finding of non-violation has been reversed by a court of appeals and the Board thereafter orders back pay."

[2] Lack of a general rule is emphasized in *Kohler* where the Board tolled only between the date of its original decision and the date of the remand.

hardly evidence of arbitrariness, particularly since the Company did not even lay claim to such exception before the Board.

Actually, to toll under the circumstances of this case would have been clearly arbitrary. In the first place, as Board counsel observes, the wrongdoer's detrimental reliance upon a dismissal order is the only conceivable equity in favor of tolling. *A. P. W. Products Co., Inc.*, 137 NLRB 25, 29-31, enf'd, 316 F. 2d 899, 906 (2 Cir.). Absent detrimental reliance, the wrongdoer has no standing to invoke a toll. Since the Company here insists as vigorously after reversal of the Board's original decision as before that the Examiner was wrong and that its discharge of Burinskas must stand, it can hardly be heard to attribute to reliance upon the Board his non-reinstatement during the period when a majority of the Board agreed with it.[3] *Taylor Forge & Pipe Works*, 113 NLRB 693, 705, n. 10, enf'd, 234 F. 2d 227, 231 (7 Cir.), cert denied, 352 U.S. 942.

The cases in which the Board has tolled are clearly distinguishable also on another ground. The Board now explains that in reversing the Examiner a majority *did* reject credibility findings based in part upon demeanor, in violation of the Board's own well settled decisional rule. Brief for Petitioner in No. 18,054, pp. 15-16, n. 15. Thus, its initial decision adverse to Burinskas did not even cross the threshold of permissible adjudication. Cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-267; *Service* v. *Dulles*, 354 U.S. 363, 372-373. To deprive the victim of discrimination of recovery for his loss of earnings and present a commensurate windfall to the wrongdoer, because in reversing its Examiner the Board violated its own rule, would

[3] Cf. the Second Circuit's observation, 316 F. 2d at 906: "* * * it seems rather fanciful to suppose that A. P. W.'s failure to rehire Dogan between the Examiner's report on June 2, 1961, and the Board's order on May 2, 1962, long as that interval was, sprang from reliance on the Trial Examiner's favorable report or from the assumed lack of adverse financial consequences flowing from it."

obviously be so irrational, so inequitable and so destructive of the remedial policies of the Act that it could not possibly stand. Cf. *Greene* v. *United States*, 376 U.S. 149, 161, 162; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365-366, n. 18; *A. P. W.* case, *supra*.

To bring detrimental reliance into play it must first appear that reliance is justified. Where, as here, a decision claimed to have been relied upon was considered unreviewable without further explication and was found by the Board on re-examination to travel outside its established orbit, reliance, if any, was unreasonable.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Board's order on remand should be enforced in full.

Respectfully submitted,

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18054

ANDREW BURINSKAS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF QUESTION PRESENTED

The question presented is set forth on the first page of petitioner's brief.

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United States Court of Appeals

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v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Andrew Burinskas to review and set aside an order of the National Labor Relations Board issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[1] The Board's Decision and Order[2] are reported at 142 NLRB No. 21. This Court has jurisdiction under Section 10(f) of the Act.

[1] The relevant portions of the Act are set out in an Appendix to petitioner's brief and an Appendix to this brief, p. 19, *infra*.

[2] Herein "D&O" refers to the Board's Decision and Order; "I.R." refers to the Trial Examiner's Intermediate Report; and "Tr." refers to the Transcript of Testimony.

I. The Board's findings of fact

Briefly, the Board found that Ferrell-Hicks Chevrolet, Inc. (hereafter the "Company"), had not violated Section 8(a) (3) and (1) of the Act by its discharge of petitioner Andrew Burinskas (hereafter "Andy Burns"). The underlying facts are as follows:

A. Burns' Union activity

Burns was hired by the Company as an automobile salesman in September 1955 (I.R. 2). In July 1961 he became a member of the Automobile Salesmen's Union of Chicago and Vicinity (hereafter the "Union"), and during the same month became chairman of its organizing committee (I.R. 2). In this capacity, he solicited membership, distributed literature, and filed petitions with the Board seeking representation elections among the salesmen of a number of Chicago area automobile dealers, including the Company. At the consolidated hearing held on these petitions, Burns represented the Union and gave testimony (D&O 2, I.R. 2). On November 27, 1961, the Board's Regional Director ordered an election to be held among the Company's salesmen. The election was subsequently scheduled for December 20, 1961 (D&O 2, I.R. 2).

The day after that assigned by the Board's Regional Director for the posting of election notices, Burns asked Bert M. Ferrell, president of the Company, about the absence of these notices. Ferrell, after explaining that the notices had been delivered

late, gave them to Burns for posting. While Burns was so engaged, Ferrell passed by and, looking at Burns, said: "No son of a bitch is going to tell me how to run my business." When asked by Burns to repeat what he had said, Ferrell did. Burns walked away (I.R. 2).

In May 1961 the Company had announced that Christmas bonuses would be paid, computed on the basis of cars sold during the period from April to December, 1961 (Tr. 17–18). On Friday or Saturday, December 15 or 16, Ferrell told Burns that the Company Christmas party, at which the bonuses would be distributed, was to be held on Tuesday, December 19. Burns protested that the Company could not hold the party "this close to the election" because of a "ruling * * * pertaining to 24 hours before election time when [he could] not throw this party."[3] Ferrell said he would check. A short while later Ferrell told Burns he was right and that the party had been rescheduled for Monday, December 18 (I.R. 2–3).

A few days before the election, the Company sent a letter to all its salesmen other than Burns, over Ferrell's signature, referring to the relationship of salesmen and Company as a marriage and stating that they could not afford to have a third party come in to break up this marriage (I.R. 3).

During the election held at the Company place of business on December 20, Burns, acting as the Union's observer, saw Ferrell in the area where the balloting was taking place. He said, in the presence of Isabel

[3] See Peerless Plywood Co., 107 NLRB 427.

Laban, the Company's bookkeeper and observer at the election, "Get that son of a bitch out of here" (I.R. 3; Tr. 299–302). This remark was immediately reported to Alma Klinnicke, the Company's business manager, and Jack Haggerty, the Company's new car sales manager (I.R. 3).

The Union was unsuccessful in the election held at the Company, but was certified by the Board as bargaining representative at two other dealerships (D&O 2, I.R. 3). No objections to conduct affecting the results of the election were filed, nor were there charges of unfair labor practices concerning any circumstances surrounding it (D&O 2).

The day after the election, Ferrell told Burns to forget about the election and that he had instructed the other salesmen not to tease him. Burns complained that he was really hurt by the election results and said he felt that "it was [the Company's] money that beat [him]" (I.R. 3). Shortly thereafter, Burns sent a bulletin entitled, "Keep the Ball Rolling" to all the Company's salesmen, urging continued effort on behalf of the Union. Haggerty, seeing a copy of this, mentioned to Burns that he thought Burns was through with the Union. Burns told him to wait for the results of the next series of elections at the other auto dealers later in the month, and then Haggerty would know if he were "through or not" (I.R. 3–4).

In January 1962 Burns circulated among the Company's salesmen copies of the Union's wage proposals to be submitted to the dealers at which it was certified (I.R. 4). On seeing one of these, Haggerty observed to Burns that "it was economically impossi-

ble for a dealer in the Chicago area to pay that amount of money to their salesmen and stay in business" (I.R. 4). Haggerty also asked Burns again if he were through with the Union, and again received a negative response (Tr. 74–75).

Early in May 1962 Haggerty and Burns talked about what was "going on" with the Union. Burns said that negotiations with the other dealers were being unduly delayed by evasive tactics and that the "government [was] going to start looking into this" (I.R. 4).

B. Events leading to Burns' discharge

On March 7, 1962, pursuant to Haggerty's suggestion (Tr. 332–333), Tom Frachalla was reemployed by the Company as used car sales manager (I.R. 4). Frachalla had been new car sales manager from July 1960 to May 1961, when the Company had discharged him (Tr. 185–185(a), 198). Frachalla had reason to believe that Burns had played a role in his previous discharge. Thus, after leaving the Company, Frachalla had taken a job at Southwest Chevrolet in Chicago (Tr. 185(a)). A number of the salesmen there had worked at the Company at the same time as Frachalla (Tr. 188). One of these salesmen, Joe Wentz, told Frachalla that "on many occasions Mr. Burns would get together with two or three salesmen and pick apart the job [Frachalla] was doing" (Tr. 193). Another, Ross Barcelona, apologized to Frachalla "for being what he termed jealous because of my being over attentive to another salesman named Joe Wentz, and he told me the reason the jealousy was aroused was the fact that Andy [Burns] would

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remind him of any favor Andy thought I was passing to Joe Wentz and he objected to it" (Tr. 191, 192). Furthermore, Burns, who visited Southwest Chevrolet in the course of his organizing activities, said to Frachalla: "Did you know that Mr. Ferrell let you go to suit me?" (Tr. 187).

A day or two after Frachalla's reemployment, in the course of a conversation with Frachalla, Burns said of Haggerty that he "smile[s] with [his] teeth, but one could tell [he] wasn't sincere by looking into [his] eyes." Burns further observed that Haggerty was trying to "start the Haggerty dynasty at Ferrell-Hicks." This conversation was reported to Haggerty the same day (I.R. 5, n. 7).

At a sales meeting on May 9, Haggerty, by referring to a sale made by Frachalla on May 7,* sought to demonstrate to his salesmen that they ought not classify a person who walked into the showroom as a nonbuyer solely on the basis of his appearance (I.R. 4). Some of the salesmen complained that Frachalla had been wrong in taking the customer away from the salesmen. Burns commented: "Ah s--t, he's just trying to make a point." All the salesmen broke out laughing, which, Haggerty testified, "ruined the whole effect" of his talk (I.R. 4).

Later that same day, Burns told Haggerty that Frachalla's action "was a stinko" and added: "Jack, Tom Frachalla is out to get your job" (I.R. 4).

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*On May 7, a young couple entered the showroom but were ignored by the four or five salesmen present. Frachalla greeted the couple and "within 30 minutes from the time they entered the door we were changing the plates to make delivery" of a used car (I.R. 4).

Around 9 p.m. that evening, Frachalla, whose day off it had been, came to the Company's place of business to see if everything was in order. He met Haggerty and asked him how things had gone that day. Haggerty told him that the sale of May 7 "got kicked around and [that] Andy Burns told him to look out" for Frachalla. When Frachalla pressed Haggerty for more information, Haggerty told him that he was leaving to see a customer, and asked Frachalla to stop at his home later that evening. Frachalla arrived at Haggerty's home about 10 p.m. and Haggerty an hour later (I.R. 5).

Haggerty began the discussion by telling Frachalla about that day's events—Burns' conduct at the meeting and his warning to him that Frachalla "was out to get [his] job." The two then discussed the prior incidents involving Burns—his statement to Frachalla in March that Haggerty was insincere and was trying to start a dynasty at the Company and his calling Ferrell a "son of a bitch." In light of these incidents, plus the part that Frachalla believed Burns had played in causing him to lose his job as new car sales manager with the Company (Tr. 227–228), the two managers decided to discharge Burns the next day, which they did (I.R. 5).

II. The Board's conclusion and order

On the basis of the foregoing facts, the Board (2–1) concluded that the General Counsel had failed to establish by a preponderance of the evidence that the Company had violated Section 8(a) (3) and (1) of

the Act by its discharge of Andy Burns.[5] Accordingly, the Board ordered the complaint dismissed (D&O 4).

SUMMARY OF ARGUMENT

1. Petitioner's argument, to the extent it rests upon the assertion that the Board accepted the Trial Examiner's finding that Haggerty and Frachalla testified falsely as to the reason for Burns discharge, is wholly without substance. The Board did not accept this finding, but, in finding Burns not to have been discriminatorily discharged, impliedly found Haggerty and Frachalla to have been telling the truth when they testified that Burns was discharged because he had made disrespectful remarks about management officials and because he was attempting to create dissension between Haggerty and Frachalla.

Nor has the Board improperly invaded the Trial Examiner's domain in rejecting his conclusion that Burns was discharged due to his Union activities. The conclusion of the Examiner was based primarily upon his analysis of undisputed facts in the record. The Board, proceeding from the same undisputed facts, drew a contrary conclusion. In these circumstances, the Examiner's conclusions, to the extend they differ from the Board's are entitled to no special weight. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494, 496.

2. Substantial evidence supports the Board's conclusion that Burns' discharge was not caused by his

[5] In so finding, the Board rejected a contrary finding made by the Trial Examiner (I.R. 6–8).

Union activities. Burns, prior to the events of May 9, 1962, had called the Company's president a "son of a bitch," had accused Haggerty of duplicity, and was believed by Frachalla to have caused his earlier discharge as new car sales manager by stirring up dissatisfaction with Frachalla's performance of his duties. On May 9, 1962, the day on which Haggerty and Frachalla decided to discharge Burns, he had by an impertinent remark caused the disruption of a sales meeting conducted by Haggerty. Also, on the same day, Burns told Haggerty that Frachalla was "out to get [his] job." Under these circumstances, the Board properly found the General Counsel not to have established by a preponderance of the evidence that Burns' discharge was caused by his Union activities.

Nor do the factors relied upon by petitioner compel a contrary conclusion. The fact that Haggerty and Frachalla's decision to discharge Burns was made at a meeting on the evening of May 9, outside normal business hours is explained by the serious nature of Burns' misconduct and the fact that Frachalla, who was off duty on May 9, did not learn of Burns' misconduct until 9 o'clock that evening. And, while Burns' discharge followed by about a week a conversation with Haggerty in which Burns indicated his continued interest in Union activities, Haggerty had never been in any doubt as to Burns' continued Union adherence. Finally, the mere fact that there is some evidence that the Company was opposed to the organization of its salesmen is hardly enough, in light of all

the other evidence in the record, to support a conclusion that Burns' discharge was predicated on his Union activities.

ARGUMENT

I. Introduction

Petitioner, in his brief (pp. 15–20), states that the Board accepted the Trial Examiner's finding that Haggerty and Frachalla testified falsely as to the reason for Burns' discharge. From this, petitioner goes on to argue that the Board, having rejected the Company's evidence as to the motive for Burns' discharge, improperly failed to find a discriminatory motive. This argument, however, is based on a false premise, for the Board did not accept the Trial Examiner's finding that Haggerty and Frachalla testified falsely as to the reason for Burns' discharge. To the contrary, it is evident that in finding Burns not to have been discriminatorily discharged the Board impliedly found Haggerty and Frachalla to have been telling the truth when they testified that Burns was discharged because he had made disrespectful remarks about management officials and because he was attempting to create dissension between Haggerty and Frachalla. Thus petitioner's argument, based on the erroneous premise that the Board accepted the Trial Examiner's finding that Haggerty and Frachalla testified falsely as to the reason for Burns' discharge, is wholly without merit.

Nor has the Board improperly invaded the Trial Examiner's domain in rejecting his conclusion that Burns was discharged due to his Union activities.

For, while the Examiner indicated at one point (I.R. 7) his reliance on "the demeanor of the witnesses involved as they testified," it is clear, upon examination of the Intermediate Report that his disbelief of the reasons asserted by the Company for Burns' discharge was based upon his analysis of the undisputed facts in the record. From those facts, the Examiner drew the inference that Burns had been discharged because of his Union activities and that the testimony of Haggerty and Frachalla to the contrary was not to be believed. The Board, proceeding from the same undisputed facts, drew a contrary inference. In these circumstances, the Trial Examiner's conclusions, to the extent they differ from the Board's are not entitled to special weight. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 494, 496; *Puerto Rico Drydock Co.* v. *N.L.R.B.*, 109 App. D.C. 78, 81, 284 F. 2d 212, 215; *N.L.R.B.* v. *Pyne Molding Corp.*, 226 F. 2d 818, 819 (C.A. 2); *N.L.R.B.* v. *Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union No. 135*, 212 F. 2d 216, 217 (C.A. 7). The question for the Court remains whether the Board's conclusions are supported by substantial evidence on the record as a whole. For, if they are, the Board's order is entitled to stand. *Universal Camera Corp.* v. *N.L.R.B.*, *supra*; *Puerto Rico Co.* v. *N.L.R.B.*, *supra*; *International Woodworkers of America* v. *N.L.R.B.*, 104 App. D.C. 344, 345, 262 F. 2d 233, 234; *International Union of Electrical Workers* v. *N.L.R.B.*, 273 F. 2d 243, 247 (C.A. 3); *N.L.R.B.* v. *Thomson Plywood Corp.*, 222 F. 2d 364, 365 (C.A. 4); *N.L.R.B.* v. *Waterfront Employers of Washington*, 211 F. 2d 946, 953 (C.A. 9):

N.L.R.B. v. *Akin Products Co.*, 209 F. 2d 109, 110–111 (C.A. 5); *N.L.R.B.* v. *Wiltse*, 188 F. 2d 917, 925 C.A. 6), cert. denied, 342 U.S. 859.

II. Substantial evidence supports the Board's finding that Burns' discharge was not caused by his Union activities

As is set out in the Counterstatement, *supra*, pp. 3–4. Burns, on December 20, 1961, called Bert M. Ferrell, the Company's president, a "son of a bitch." This remark, made in the presence of Isabel Laban, the Company's bookkeeper, was immediately reported to business manager Alma Klinnicke and new car sales manager Jack Haggerty.

Subsequently, in March 1962, Burns accused Haggerty of duplicity, saying that he "smile[s] with [his] teeth, but one could tell [he] wasn't sincere by looking into [his] eyes." These remarks were made by Burns to Tom Frachalla, who, after having been discharged by the Company as new car sales manager the previous May, had just been rehired as used car sales manager. And while the object of Burns' remarks at this time was Haggerty, Frachalla had reason to believe that Burns had, in the past, engaged in similar conduct directed at him, and that this conduct had resulted in his previous discharge. Thus, Frachalla had been told by former employees of the Company that Burns had attempted to stir up dissatisfaction among company salesmen with respect to Frachalla's performance of his duties as new car sales manager. Furthermore, Burns himself had boasted to Frachalla that he had caused Frachalla's discharge. In brief, so far as Frachalla was concerned, Burns had not only

caused him to be discharged, but now, by similar means, was attacking the position of Jack Haggerty, who had been instrumental in getting Frachalla rehired.

Finally, on May 9, 1962, Burns, by an impertinent remark, caused the disruption of a sales meeting conducted by Haggerty. Also, on the same day, he stated to Haggerty, "Jack, Tom Frachalla is out to get your job."

The combination of all these incidents, the Board found, led Frachalla and Haggerty to decide, on May 9, to discharge Burns the following day because he had made disrespectful remarks and because he was attempting to create dissension between Haggerty and Frachalla. Thus, the Board stated (D&O 3):

> Each [Haggerty and Frachalla] was aware that Burns had made uncomplimentary remarks about him to the other, and Frachalla, for one, had reason to fear that Burns' tactics might again cost him his job. Nor do we find it altogether unreasonable to believe that Haggerty and Frachalla may also have been influenced in deciding to discharge Burns by other remarks he had made about them and about Ferrell which they considered to be disrespectful.

It is petitioner's contention that Burns was discharged because of his Union activities, and that the reason assigned for his discharge—that he had made disrespectful remarks about management officials and was attempting to create dissension between Haggerty and Frachalla—was but a pretext. The evidence adduced to support this contention does not, however,

stand analysis. Thus, the fact that Frachalla and Haggerty's decision to discharge Burns was made at a meeting on the evening of May 9, rather than during normal business hours, does not, contrary to the Trial Examiner's views, indicate that the asserted reason for the discharge was pretextual. May 9, the date of Burns' culminating misconduct, was Frachalla's day off, so that he was unaware of Burns' conduct of that date until 9 p.m. that evening, when he met Haggerty at the Company office. When, however, Frachalla learned of Burns' renewed efforts at stirring up dissension between him and Haggerty, it was only natural that, in light of his belief that Burns' past efforts of this nature had resulted in his earlier discharge, he should want immediate action to be taken. Furthermore, the following day was Haggerty's scheduled day off (Tr. 340). Thus, the fact that the decision to discharge Burns was made on the evening of May 9, rather than deferred until May 11, the next day when both Haggerty and Frachalla would be on duty, does not suggest that Burns' conduct of May 9 was not the cause of the discharge, but rather that this conduct was regarded as so serious, especially by Frachalla, as to require immediate action.[6]

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[6] The serious nature of Burns' misconduct, combined with its repetition, also explains why Haggerty and Frachalla chose to discharge Burns on May 10, rather than merely give him a warning, a circumstance on which petitioner relies to show the pretextual nature of the asserted reason for discharge. Burns had, time and again, sought to stir up dissension between Haggerty and Frachalla. Furthermore, his conduct of this sort was believed by Frachalla to have resulted in Frachalla's pre-

Still another factor alleged to indicate that Burns' discharge was in retaliation for his Union activities is that the discharge followed by about a week a conversation between Burns and Haggerty at which Burns, in response to an inquiry by Haggerty as to "What's going on with the Union" told him that the government was going to start looking into the evasive practices of other dealers in delaying collective bargaining with the Union. This statement, it is argued, made it clear to Haggerty that Burns was not through with the Union, but remained active therein. From this, Haggerty allegedly decided that "The best and quickest way to avoid organization of [The Company's] employees was to rid [it] of the Union's most active proponent" (I.R. 8). The May 9 incidents, it is argued, furnished Haggerty with a pretext to do just this.

In the first place, however, Haggerty had never been in any doubt, even after the election, as to Burns' continued Union adherence and activity. Thus, after the election in December, when Haggerty asked if Burns was through with the Union, Burns replied that Haggerty ought to "wait and see the results of the elections to be held" later that month at other dealers and then he would see whether Burns was "through or not." Furthermore, in January 1962, when Haggerty discussed with Burns the contract proposals that the Union had sent the dealers

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vious discharge. Under these circumstances there was no reason to believe a warning would have any effect on Burns, nor was there anything unusual about discharging him without prior warning.

at which the Union was the bargaining representative, he again asked Burns if he were through with the Union and again received a negative answer. Nor is there anything in the record that would indicate that Haggerty had reason to believe that Burns had changed his attitude in the period between January and May. Thus, the May conversation added nothing to Haggerty's knowledge of Burns' union activities and hardly supports a conclusion that Burns was discharged in May for his union activities—especially in light of the fact that the Company had been aware of those activities since the previous July, despite them had prevailed in the December election, and could not possibly be faced with another election before the following December.[7]

Nor does the record contain such evidence of anti-union animus as would require the Board to look with suspicion on the Company's explanation for Burns' discharge. Compare *N.L.R.B.* v. *Chronicle Publishing Co.*, 230 F. 2d 543, 547 (C.A. 7), and *John S. Barnes Corp.* v. *N.L.R.B.*, 190 F. 2d 127, 131 (C.A. 7), with *Sunshine Biscuit Co.* v. *N.L.R.B.*, 274 F. 738, 740–742 (C.A. 7). While petitioner points to evidence that the Company was opposed to the organization of its salesmen, and that the Company manifested that opposition before the December 20 election, his argument in this respect is significantly weakened by the fact that no objections were filed by the Union to conduct affecting the results of the election—this

[7] Section 9(c)(3) of the Act precludes the holding of more than one valid election in any twelve-month period.

despite the Board's doctrine that it will set aside any election not conducted under "laboratory conditions."[8] Nor, either before or after the election, were any charges filed with the Board that the Company, apart from the allegedly unlawful discharge of Burns, had interfered with, restrained or coerced its employees in violation of Section 8(a)(1) of the Act.[9]

Finally, it is undisputed in the record that the Company had bargaining relations with three other unions representing employees other than salesmen (Tr. 343–344, 394).[10] In brief, the most that can be said is that there is some evidence that the Company was opposed to the unionization of its salesmen—a not uncommon phenomenon, and hardly enough to indicate a strong anti-union animus, much less enough on which to base a conclusion that Burns' discharge

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[8] General Shoe Corp., 77 NLRB 124, 127.

[9] This is not, contrary to petitioner's analysis of the Board's decision (Br. pp. 20–21), to argue that evidence of a violation of Section 8(a)(1) is a necessary prerequisite to a finding that a discharge has been discriminatorily motivated, but merely that the absence of even a *charge* of a Section 8(a)(1) violation is of significance in determining the depth of the Company's opposition to unionization of its employees.

[10] It is also uncontradicted in the record that Haggerty said to Burns on one occasion, "I have nothing against the Union" (Tr. 350), and on another occasion, made the following statement to Burns (Tr. 348–349):

"I told Andy at that time, after he explained to me about the Union and all about it * * * I said, 'Andy' I said, 'If you think the Union is what you want, if you think it's for the men and for the betterment of the men and you honestly beileve this to be true,' I said, 'You are bound morally to follow it up and stay with it.' I said, 'You never will feel right the rest of your life if you didn't do it.'"

was predicated upon his union activities. *Sardis Luggage Co.* v. *N.L.R.B.*, 234 F. 2d 190, 195–196 (C.A. 5); *Interlake Iron Corp.* v. *N.L.R.B.*, 131 F. 2d 129, 133 (C.A. 7); *Seiberling Rubber Co., Batesville Division*, 142 NLRB No. 29, 53 LRRM 1030, 63–1 CCH NLRB Para. 12,271. Thus, we submit, the Board properly found that the General Counsel had failed to establish by a preponderance of the evidence that the discharge of Andy Burns violated Section 8(a) (3) and (1) of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the petition to review and set aside the Board's order.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> Section 9(c)(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

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